THE PUBLIC CONSCIENCE

A CASE BOOK IN ETHICS

GEORGE CLARKE COX

BROTHERS COLLEGE

THE PUBLIC CONSCIENCE

SOCIAL JUDGMENTS IN
STATUTE AND COMMON LAW

BY
GEORGE CLARKE COX

WITH AN INTRODUCTION BY
RICHARD C. CABOT
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The body of the law is the professed morality of states; and that which holds throughout generations and ages, essentially unchanged, may, without impropriety or exaggeration, be called the actual morality of states.

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To

A. M. C.

HOME-MAKER, FRIEND AND MATE
A LOVER OF TRUTH
THIS BOOK IS DEDICATED

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AUTHOR'S PREFACE

The publication of this book, finished some time ago, has been delayed first by the War and then by my own preoccupation with other imperative duties. Its composition, while contemplated for over ten years, was undertaken at the request of the late Edward de Coppet, whose interest in the scientific study of ethics was profound. He gathered around him in New York, during the winter of 1915–16, a notable group of men to make plans for the establishment of a Research Institute for the Scientific Study of Ethics. It was Mr. de Coppet's idea to endow such a research institute; but his sudden and lamented death destroyed the hope that such a plan might be realized, at least in the near future.

One of the men drawn into that group was my brilliant friend, Dr. Elmer E. Southard of the Harvard Medical School, now dead; neurologist, philosopher and psycho-pathologist. Dr. Southard warmly approved of studying and teaching ethics by the case method and promised his aid in providing abnormal cases. His sympathy and advice are here remembered.

I am indebted to another friend, Hastings Lyon, Esq., of the New York Bar, for many suggestions and for aid in preparing a table of cases: to Professor William P. Montague of Columbia University for the

title to this book: to Dean Roscoe Pound of the Harvard Law School for his suggestions and warm interest in the project and for bringing it to the attention of Dr. Richard C. Cabot: through whose persuasion the book was finally made ready for the press.

I wish to thank Professor Joseph H. Beale for the privilege of quoting from his "Cases on Criminal Law," Richard Ames, Esq., of the Harvard Law School, for permission to quote from his father's "Cases on Torts" and Professor Richard T. Ely as well as Messrs. Macmillan, for a like privilege in use of Professor Ely's studies on "Property and Contract."

I am grateful to the authorities of Columbia University for the free use of their University and Law Libraries where much of the book was written.

The first chapter of this book — now considerably modified — appeared in April, 1916, in the Journal of Philosophy, Psychology and Scientific Methods. Acknowledgement is made to the editors of that publication for permission to reprint.

The idea of using the case method in the study of ethics was wholly original with me; but, after I had spent some years in this study, I discovered Professor Lévy-Bruhl's work, which supports the idea strongly; and I feel proud to associate my work with his name.

The recent Great War will lend strong support to certain conclusions which I have drawn; but the cases which will be found in the years to come, when the history of that war shall have been written dispassionately, are not now available.

It is my hope that this modest first attempt at a case book in ethics will be found useful not only to students and teachers of ethics, but also to students and teachers of sociology and law — and to the general public.

The world seems to me to be blindly groping for a sure foundation for its moral concepts. The old certainty is gone. Men seem afraid that there may be found nothing to take its place. I believe that certainty will again be attained; but that it cannot be attained without the same patient, widespread, coöperative laboratory method which has characterized the physical sciences.

Of the imperfections and short-comings of the book, I am well aware; but it has seemed best to put it forth with all its imperfections rather than wait longer. Many men must work on this problem before it can ever hope to be solved.

The efforts of most writers on ethics have seemed to me to be bent toward edification. One cannot be truly edified until he is truly informed. A lighthouse will not be stable, in a dangerous place, until much patient work has been put where it will be lost to sight.

GEO. CLARKE COX

MONTCLAIR, N. J.
May, 1922.

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INTRODUCTION

I believe that Mr. Cox has written an epoch-making book, which deserves to alter the tone and method of ethical teaching. My reasons for this faith are:

1. That the idea is essentially new (in this field).
2. That it has come to dominate the teaching of law, medicine and other studies not fundamentally different from ethics in their aim.
3. That it has signal advantages in the field of ethical teaching.

I cannot name a single text book of ethics used today which is based on the case method. Books on casuistry, have a somewhat different aim. They give us answers to the question, "What should one do or advise?" in various imaginary situations presenting moral problems. They do not (so far as I know) offer fragments of real history and ask us independently to analyse them. They lack the flavor of actuality and the stimulus of a call to action.

Illustrations, I imagine, every teacher of ethics and every book on ethics provides. But *cases* are more than illustrations, for the student and not the teacher decides what the case illustrates. The teacher's illustrations belong to him and obey his ideas. But ethical

cases, such as this book supplies, are nobody's property and often manifest in class discussion their own independent vitality.

The case method which Mr. Cox is (so far as I know) the first to employ in *ethical* teaching, has been used in the Harvard Law School since 1870 and at the Harvard Medical School since 1894. It is used extensively in the Harvard School of Business Administration and to some extent in the teaching of logic (Dr. Sheffer) and of economics. It is the method of experience, for it seeks to bring the student face to face with concrete experiences from which somebody has already learned something in the school of life. Mr. Cox himself used it in his ethical teaching at Dartmouth College and owing to his kindness I have been able to use some of his unpublished cases in my own work with Harvard undergraduates. I am confident that it is at least as valuable in ethics as it is in law and medicine, sharing with them certain obvious advantages and possessing also its own peculiar merits for ethics. Let me illustrate:

(*a*) *It keeps a large class of students busy and interested.* A good lecturer can keep several hundred interested but not busy. They are too passive. The lecturer does most of the work and gets most of the profit. If he throws out questions into the class, the advantage is chiefly for the few who answer, rarely for the majority who are silent. With a small class one can keep everyone busy in discussion. But with a large class — one hundred or more — this is almost

impossible. In the laboratory where each student has his own specimen or experiment to attend to, many are busy at once, but many teachers are needed for supervision if the class is large.

Case teaching gives each student his own specimen (a legal, medical, economic, or ethical problem) on a sheet of paper and demands that he analyse it, experiment with it and render judgments upon it in answer to the teacher's questions. Each man is kept busy with something tangible and can learn something then and there by his own analysis and reasoning, even if he is not called up by the teacher. The method is almost as useful with 150 students as with 20. As a means whereby one teacher can call out continuous labor from many students at once, it is almost as good as an examination; yet it can be given once or twice a week throughout the college year.

(*b*) The teacher and the class face together a concrete reality. The teacher cannot entirely control the case as he controls his own illustrations during a lecture. A vividly written case may rear, kick and run away. Quite unexpected interpretations or problems are sometimes discovered by the students who then quiz the teacher as he more often quizzes them. All this adds to the interest and vitality of the hour. The teacher is not handing out all the wisdom nor himself bearing all the burdens of the exercise. Sometimes the case almost teaches itself, — an ideal result. The student attains a real experience — something that takes root in memory — whether the teacher's inter-

pretation seems profitable or not. He studies with his class as well as for them. They must observe and reflect then and there. His place is to egg them to this labor and to suggest useful tools.

(*c*) For at first the student may be puzzled how to attack the situations presented. He can be helped to pick them to pieces with the tools of analysis and then to reconstruct them in terms of a theory or solution.

"Boil down and restate," "Enumerate the *dramatis personæ*," "Propose alternative solutions," "Drag up to consciousness the principles and the data taken for granted in your judgment," "Show up the links in your chain of reasoning." Such well worn tools as these come to be used almost instinctively when the student has been led to apply them again and again and to see with pleasure how well they work on all sorts of cases.

Observation, reasoning and decision, — that is all there is to law, medicine, geology, economics, ethics or theology, and what we want is to see the student gain skill and sagacity by the actual use of these tools upon the raw materials of experience. By the case method we can actually *see that he does it* and not merely hope that he will do it in his room or in future cramming.

(*d*) By keeping back his own opinion and any existing decisions by others until the students have all evolved *and recorded* theirs, the teacher can add something of the "*hide and seek* motive" to the interest of

the case itself. In law we can announce after the discussion the judge's or the jury's decision; in medicine, we have the revelation of the autopsy. In ethics we have nothing so cogent and decisive. But when legal cases are used, as in this book, one has at least the verdict of public opinion as interpreted by judge and jury. Moreover, the students are almost always interested to know in the end what the teacher thinks, — even if they disagree. Thus one works towards a climax, as one does in a novel or a detective story, and there is competition in the solutions or the predictions offered by all who take part.

Suspense and competition are valuable adjuvants when we want students to work hard. In lecturing and in ordinary general discussion they are hard to command. In case teaching they spring up naturally.

Law cases, such as make up the bulk of this book, have the advantage of a definite decision (wise or unwise) at the end of each. The corresponding disadvantage is that they cannot cover the whole ground of ethics. Many poignant ethical problems never get into court and cannot be authoritatively decided. No one is more aware of this limitation in the present book than Mr. Cox. Any collection of suitable cases is an enormous labor. Naturally he has not been able to extend his field of search in all possible directions. But he has broken out the first path. It is for the rest of us, following his method, to collect other groups of cases from industry, from the adventures of family life or from the tangled experiences of medicine

and of social work. Ethical cases arise on the athletic field, aboard ship, on the stock exchange, in the artist's studio, in trolley cars. Obviously no one man can follow up all these clues. Many people must collaborate and will be tempted, I believe, to do so, when they have read Mr. Cox's book. For he has started a fox that many can hunt, though with the signal advantage that this fox all can catch, while no damage is done to the animal! I predict that many other case books of ethics will follow this one and that in a few years we who are trying to teach ethics shall look back in wonder at our foolishness that so obvious and useful a method never occurred to us or was used by us till he suggested it.

Mr. Cox has kept his own personality and his own views in the background. He gives us the cases with little of comment or interpretation. That is for each teacher and every pupil to supply in his own way and by the light of such principles as he can find. To some timid teachers this will seem a drawback. But in the long run I believe it will increase the usefulness of the book as a collection of human documents which each can interpret in his own way. In class-room use I take it the teacher will work out beforehand suggestive questions and sidelights on each case, often giving out these questions with the case as a guide and stimulus to the class.

Mr. Cox's practice of asking students themselves to collect and bring to class cases more or less similar to his own seems to me admirable both for the students

who collect them and for the wider public which these cases may later come to serve. Thus the class which uses the case method will itself be used by the case method to extend its usefulness and its variety.

RICHARD C. CABOT

BOSTON, MASS.
May, 1922.

THE PUBLIC CONSCIENCE

"Doubtless, the most effectual mode of showing how the sciences of Ethics and Politics may be constituted, would be to construct them; a task, it needs scarcely be said, I am not about to undertake. But even if there were no other examples, the memorable one of Bacon would be sufficient to demonstrate, that it is sometimes both possible and useful to point out the way, though without being oneself prepared to adventure far into it." [1]

"We advocate a method . . . which considers objectively the given social reality, studying it in the civilization in which we live, and comparing this with others which we may be able to know. In a word, we demand that one use, in so far as the character proper to social reality permits, the same method which has shown itself so fruitful in sciences which deal with physical reality. Hence, a 'psychological' or 'moral' study of the sentiments, however interesting it may be in certain respects, has no part in the science with which we are engaged. Our directing principle is to relate facts, duly analyzed, to their constant laws, and effects duly stated, to the forces which produce them. If the instincts, needs, and sentiments, more particularly the sentiments called moral, are of the number of these forces, a study of given social reality will make us acquainted with the fact, and that, too, in the only way which can be called scientific, namely, by the exact statement and measurement of their effects." [2]

"A man who thinks in a different fashion from others, even about problems which do not immediately touch upon action and which every one can consider without passion, provokes among those others a certain uneasiness, an astonishment which is not free from ill will." [3]

[1] J. S. Mill, "Logic," Vol. II, p. 419, 10th ed.

[2] L. Lévy-Bruhl, "La Morale et la Science des Moeurs," p. 225.

[3] *Ibid.*, p. 249.

CHAPTER I

ETHICS AS SCIENCE AND AS ART

I

ALMOST any undertaking may be and has been described as a science, just as almost any one may and does call himself a professor.

When I propose to consider ethics as a science it is in the narrowed sense of "ordered knowledge of natural phenomena and of the relations between them." I have in mind also (*a*) the saying of Svante Arrhenius that "science implies measurement," (*b*) the practice of experimental research instituted by Francis Bacon,[1] and (*c*) Galileo's practice of searching for the "how" rather than the "why" of things.

We need no account of scientific method. All the educated world knows what it is and admires its efficacy. It has had its hard days in the past when its

[1] It need hardly be said that the "Baconian pure induction or mere observation" has been left far behind in what we, none the less truly, term the inductive methods of modern science. Mill has warned us that "the conclusions of theory cannot be trusted, unless confirmed by observation; nor those of observation, unless they can be affiliated to theory. It is the accordance of these two kinds of evidence separately taken — the consilience of *a priori* reasoning and specific experience — which forms the only sufficient ground for the principles of any science so "immersed in matter," dealing with such complex and concrete phenomena, as "Ethology," for which, see below, p. 6.

devotees were not only treated as impious, but were even destroyed in various delicate ways. But why consider that that which is "the ordered knowledge of *natural phenomena*" can possibly be applied to ethics? There's the rub! for ethics has, heretofore, been forbidden territory to science.

Now the various natural sciences, such as physics, chemistry, geology, biology, etc., have all had their theological and metaphysical stages before they emerged into the positive stage. Every science is *ipso facto* positivistic and naturalistic. There is, however, a positivistic temper against which philosophers and theologians have justly protested. It is the temper of that science which does not recognize the rock whence it is hewn; for all the sciences have been gradually separated from the more inclusive if less defined discipline known as philosophy. The natural sciences are taught in many places today as natural philosophy, and it were well that we should always recognize the significance of this connection.

Physics and chemistry, as the most exact of the natural sciences, and hence the most dogmatic, are quite apt to forget their origin and to overlook the fact that they are based upon unproved assumptions. Their deeper questions are still questions for philosophy. Still, one must acknowledge that, so long as they were under the tutelage of theology or metaphysics, they made little progress; and the same may be said of the more recently emancipated sciences, which, moreover, tend to split up into subordinate

sciences. Thus general biology divides into zoölogy and botany, physiology, psychology, psychiatry, etc., and each of these in turn becomes more productive when it has set up a household of its own. There are problems in each of the sciences which remain philosophic problems — some would say, chiefly because they are unsolved. Be it so. There are many soluble problems in ethics, I believe, and it is to those that I would see men turn their attention today.

II

Now many writers on ethics have spoken of it as a science; but they have not treated it as such. Many have added greatly to our exact knowledge in ethical fields who yet have not submitted the entire subject of ethics to scientific method. Some recent writers have been intensely practical in their applications of ethics and franker on some biologic subjects than any one heretofore, who are yet quite unscientific in their total attitude.

The greatest name which may be cited in support of this sort of enterprise is that of John Stuart Mill; but it is, of course, quite foreign to its character to claim anything on the ground of authority. We may then say, better, that the argument of Mill in the Sixth Book of his "System of Logic" has set forth in masterly fashion the reasons for according the same sort of treatment to the study of man in society as has been given to his physical nature. He says: [2]

[2] "System of Logic," Book VI, p. 418, Vol. II, 10th ed.

"If there are some subjects on which the results obtained have finally received the unanimous assent of all who have attended to the proof, and others on which mankind have not yet been equally successful; on which the most sagacious minds have occupied themselves from the earliest date, and have never succeeded in establishing any considerable body of truths, so as to be beyond denial or doubt; it is by generalizing the methods successfully followed in the former inquiries, and adapting them to the latter, that we may hope to remove this blot on the face of science"; and he adds that "the remaining chapters (of the 'Logic') are an endeavor to facilitate this most desirable object." He insists that there is or there may be a science of human nature. "Any facts are fitted to be a subject of science which follow one another according to constant laws"; and he finds that the laws of the formation of character are the principal object of scientific inquiry into human nature, these being deduced from the general laws of mind. "The laws of mind [3] . . . compose the universal or abstract portion of the philosophy of human nature; and all the truths of common experience, constituting a practical knowledge of mankind, must, to the extent to which they are truths, be results or consequences of these."

Mill's "Science of Ethology" is a science of character and of its formation — it corresponds to the art of education; and it will be evident from my strict

[3] *Ibid.*, p. 448.

separation of the science of ethics from the art of ethics why, in spite of his authority and in spite of his good will toward such an enterprise as this, it is not Mill who has most clearly formulated the method of procedure for a science of ethics.

The only writer, whom I know, who has proposed a strictly scientific programme for ethics — if we except Comte on account of his general attitude — is, significantly enough, L. Lévy-Bruhl.[4] In his book "La Morale et la Science des Moeurs," [5] he proposes a plan of study to which I can give almost unqualified adhesion; though I would supplement it in significant ways. Durkheim [6] is a kindred spirit.

The work of these two brilliant and honest minds has been strangely overlooked in English-speaking circles. Nothing more significant for ethics since the days of Jeremy Bentham and the Mills has been written than the work of Lévy-Bruhl. It is a complete programme for ethical science, a work which has gone into five editions in France; yet it is practically unknown and certainly untaught in this country. There is hardly a mention of Lévy-Bruhl and Durkheim in contemporary ethical literature in spite of their great influence in Europe. In the *International Journal of Ethics*, during the entire period of its existence, I can

[4] The biographer of Comte.

[5] Translation by Elizabeth Lee. London, 1915.

[6] Émile Durkheim, "De la Division du Travail Social" and "Les Règles de la Méthode Sociologique." Cf. also my article in the *Journal of Philosophy, Psychology and Scientific Methods*, Vol. X, p. 337, "The Case Method in the Study and Teaching of Ethics."

find but two brief and utterly inadequate reviews of their works, works of recognized power but which present a totally new viewpoint in ethics.

The "Ethics" of Dewey and Tufts was written as a textbook, not as a preliminary book in the scientific study of ethics. Its three sections embrace a historical treatment of human customs and manners,[7] an analysis and presentation of classic theories in relation to the real problems of life, and a final section which might be called a programme for social reform. It is not avowedly inductive and naturalistic; but it is more sympathetic to the scientific attitude than any actual performance within my knowledge. None of the previously named writers apparently had the intention of making experimental studies.

Westermarck[8] has proposed "to study moral consciousness as a fact." Sutherland[9] has written of the genesis of morality. Professor Sharp[10] has done valuable work in casuistical studies. Hobhouse[11] has made a comparative study of ethics. None of them, I think, has initiated a real science of ethics, though scientific method has been used by all, and all have gathered valuable material which the new science not only may, but must use.

[7] There is no substitute for the French word *moeurs* — although Professor Sumner has nearly translated it in *folk ways*.

[8] Edw. Westermarck, "The Origin and Development of the Moral Ideas."

[9] A. Sutherland, "The Origin and Growth of the Moral Instinct."

[10] F. C. Sharp, "A Study of the Influence of Custom on the Moral Judgment." *Bulletin of the University of Wisconsin*, 1908.

[11] L. T. Hobhouse, "Morals in Evolution."

My purpose is so to separate the study of ethical material as subject of science from any conclusions which may be drawn from it, that different investigators may at least have a chance to know what it is that they are agreeing or disagreeing about.

III

The greatest obstacle in the way of a scientific study of ethics is its usual classification, with logic and esthetics, as a normative science.[12]

Now the course of the centuries has seen the production of not one, but many sciences of ethics on this basis, which is to say, no science at all. If by normative we mean merely *ideal,* then we may ask whether our science does not become at once an art. The standards are somehow already at hand. All that remains is to apply them in the best and most practical way. But if it is a question how men come to have these various standards, these "types of ethical theory," then we have a genetic inquiry to begin with and we may, by classification, formation of hypotheses, experiment, etc., form a true science of ethical theory, as we may have a science of anything whatsoever.

But, I take it, this is not the meaning of those who

[12] Rashdall, "Theories of Good and Evil," Vol. II, p. 414. "Logic, esthetic, and ethic are sometimes spoken of as normative sciences, i.e., sciences which set up standards or which deal not simply with what is, but with what ought to be. They determine the principles upon which we distinguish between the true and false, right and wrong, judgments about the true, the beautiful, and the good."

protest against ethics as a natural science and claim that it is rather normative. Their protest is against the intrusion of the naturalistic method at all. Seeing the absolutely imperative character of the standard when achieved or realized, it is conceived to have a Minerva-like directness and timelessness of source. This is deceptive. Norms are in all essential respects attained in the same fashion as natural laws. The mere fact that the norm says "ought" and the law says "does,"[13] does not wholly differentiate them. The natural science method is as applicable to the discovery of the growth of norms as it is to the discovery of laws, though it is true that the individual or group cognizant of these norms has not attained them by an inductive process. It has them, and then it attempts to justify them. It is just my contention that a disinterested inductive study is essential to the discovery of the "how" of their acquisition. One may observe likewise that the "norms" of physics are as imperative to the intelligence as the norm of ethics is to the will.

The name "science" is not trade-marked; and we may speak of Christian science and normative science

[13] A careful distinction must be made and kept in mind between the law which describes how things do behave and the law which imposes the will of the lawgiver.

"If ethics (*la morale*) has at the same time to prescribe and to legitimize its prescriptions rationally, if it has to be at the same time normative and theoretic, its imperatives will have to be laws. Thence arises the ambiguous and bastard concept of the *moral law*, which, on its theoretic side, approximates the law of nature, and on its normative side, law understood in the social and judicial sense." — Lévy-Bruhl.

if we wish; but these are not natural sciences, and neither of them claims to be such. The characteristic of a normative science is that its principles are postulated. It makes no difference whether one be an intuitionist ,a utilitarian, or an evolutionary moralist, since these, however different in other ways, are alike in their method of acquiring the initial position.[14] They get it *a priori* every time; and it is not surprising that, after the lapse of twenty-five centuries, the different theories are no nearer together than they were at their separate beginnings.

Wundt,[15] recognizing " the universal applicability of the purely descriptive standpoint to all departments of human knowledge " to be unquestionable, says, " we should still take into consideration that the estimate of the value of facts is also itself a fact and a fact which must not be overlooked when it is there to

[14] E. Durkheim, " De la division du travail social," p. 18. " Il est évidemment impossible qu'on puisse jamais trouver la loi qui domine un monde aussi vaste et aussi varié, si l'on ne commence par l'observer dans toute son étendue. Est-ce ainsi que procédent les moralistes? Tout au contraire, ils croient pouvoir s'élever à cette loi supérieure d'un seul bond et sans intermédiare. Ils commencent par raisonner comme si la morale était toute entière a créer, comme s'ils se trouvaient en présence d'une table rase sur laquelle ils peuvent à leur gré édifier leur système, comme s'il s'agissait de trouver, non une loi qui résume et qui explique un système de faits actuellement réalisées, mais le principe d'une législation morale à instituer de toutes pièces. *A ce point de vue il n'y a pas à distinguer entre les écoles. L'argumentation des empiristes n'est ni moins hâtive ni moins sommaire que celle des rationalistes: la maxime de l'utile n'a pas été obtenue plus que les autres à l'aide d'un méthode vraiment inductive.*" (Italics mine.)

[15] W. Wundt, " The Facts of the Moral Life." (Transl.) Page 5. Swan, Sonnenschein, and Company. London. 1897.

see. A necessary condition of any such estimate is the existence of human free will. By free will we mean here not a metaphysical faculty, but merely the empirically given capacity of choice between various actions." *Faites vos jeux, Messieurs!* Here we are again! I suppose that we shall never rid ourselves entirely of this Old Man of the Sea; but he must be locked up, temporarily at least, if there is ever to be any progress in moral science. More of him, later, when we touch upon "The Freudian Wish" of Professor Holt.

"A normative science or a science of human norms" — what can these words possibly mean? If we have our norms to begin with, there will be nothing left except application of them, and all ethics will become casuistry. But if norms are, as Wundt implies, very much like natural laws, obtained in the last analysis in the same way, one can not possibly have any objection, scientific though his temper may be, to norms as such.

Every man who has studied the historical ethical systems must have felt a sympathy with them all. Each has made some contribution of great worth, and the normative character of ethical standards is beyond question. The final command is "ought." That, among other things, differentiates ethics from physics; but man does not respond to the "ought" invariably. When he fails to respond, he suffers remorse — perhaps — but often no other penalty; when he tries to disobey the physical law he is *invariably* injured or de-

stroyed. The physical law holds for all men; the particular ethical law holds only (and as just indicated) for those who accept it; others violate its provisions with impunity except where these coincide with the principles of all other ethical systems. And, in this case, we hold, in agreement with Wundt, that these provisions have the character of a natural law.[16]

It would be rash and impertinent to say that all ethical speculation in the past had been fruitless; but it might be ventured that whatever merit the ethical systems of the past have had is owed rather to the necessary reactions of men in society than to the wisdom of ethical principles intuited by brilliant minds. One does not make a man any better by explaining hedonism to him nor any more virtuous by letting him discover that he is a natural intuitionist. And the curious fact has often been pointed out that, under Stoic and Epicurean, with quite opposite and contradictory theories, there were almost identical practical principles of action; that is to say, an Epicurus or an Aurelius would have advised the young *to do* practically identical things.[17] The reason for this is evi-

[16] "A human law states what is expected to be done, or what is usually done; but the expectation may not be realized, the custom may be broken through. Laws of nature are, in the strictest sense, inviolable, i.e., there is no meaning in talking of violating them. When a law of nature appears to be violated, this only shows that it has not been correctly stated. . . . When people speak of breaking laws of nature, they mean breaking some maxim of health, prudence, etc., based upon, or supposed to be based upon, a knowledge of the way in which nature works." — D. G. Ritchie, "Natural Rights," p. 73.

[17] I do not fail to recognize that stoicism has usually been a

dent. *Their practical rules do not grow out of their initial principles, but are rather the result of an unnoticed inductive process carried on by all men, which has its fruits in the practical wisdom of action of the most unphilosophic.* It has been suggested to me that, however similar Stoic and Epicurean may be in their practical conduct, there are none the less ethical ideals which lead men to widely different conduct, e.g. St. Augustine and Walt Whitman not only led different lives, but these lives were the legitimate outcome of their ethical philosophy. This is perfectly true. There are some consistent men in the world! And for all Emerson's contempt of it, consistency is a very great and unusual virtue.

I have not meant to imply that all ethical systems were fundamentally the same and would legitimately eventuate in the same conduct. I believe that there is *some* ground common to them all; but this is not the place to explain why I so believe.

"The normative method," if one may use such an expression, is characterized by a great deal of hypostatization. Such terms as "the right," "the good," "justice," "duty," "freedom," are of frequent occurrence. Ideal standards of conduct are planned which *might* be possible if all beings (upon whatever metaphysical basis conceived) were themselves perfect to begin with, but which become grotesque when we

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social preservative, whereas the deliberate adoption of epicurean principles has usually been followed by degeneration. Offset this by the noble life of Epicurus himself. Cf. also Lévy-Bruhl *op. cit.*, pp. 35–36.

realize that they are to be carried out by people who have imperfect bodies, faulty heredity, and a reluctant environment. No one but Kant (and a few of his sternest spiritual mates) has ever promulgated the doctrine that one must do "the good" even if all results of so doing were manifestly bad; and Kant had to take refuge in an unrealizable world in order to escape the charge of utter unreason. The doctrine that nothing is good but the Good Will leads straight to antinomianism. Its potency is all destructive.

And, even if men could agree on some one of the many historical ethical theories, how far would this advance us on our difficult way of finding out *how to behave wisely in society?* For this, I take it, is our ultimate object. I cannot believe that any one, no matter how wedded to a particular ethical theory, can fail to recognize this. The ultimate good may be what you will, — pleasure, self-realization, the greatest good of the greatest number, or the will of God — but in any case its practical manifestation must be in relations with men in some society; and I think that students — professional students — of ethics have largely lost sight of this fact. They leave the application of their theories to clergymen and social reformers, thinking their duty to be merely to discover the correct principles upon which all should act. Doubtless this would be a sufficient task if it were performed. But it is not performed; and one of the reasons, at least, why it is not performed is that the students have not borne in mind what the ultimate object of the study

was. It is always possible to consider ethics a branch of esthetics, and there are those who limit ethics entirely to its esthetic side. It may be that they are right. In any case one would by no means exclude this possibility from his investigation. That would be to become partisan and propagandist at the start. Still there can be no protest against the assumption that ethics deals with the conduct of men in society and that the chief object of it, scientific or dogmatic, is to improve the condition of man, to make society both more rational and more happy. Now every historical ethical theory has contributed something of final value. A society dominated by any one of them would be dignified and worthy, — it would have a sort of completeness — but in the case of intuitional systems, at least, it would certainly be static; and, if evolution and the Heracleitan tradition of constant change have taught us nothing else, they have convinced us that no principles which are not susceptible of constant adaptation to new conditions can possibly be of the maximum value. And so we reject the normative ethical tradition *en bloc* as essentially unfitted to our purpose.

But, aside from the difficulty of choosing between the various normative ethical traditions, and aside from the objection just made that the normative is frequently static, there remains the possibility that there *may be no universal basis* of ethics. The common prejudice that there must be a universal law of conduct, a position stated most unequivocally by

Kant, is probably closely connected with the nearly universal monism which characterizes the general public even more than the philosophical world. Without declaring for monism or pluralism, the *possibility* that our investigation may lead to the latter, must be foreseen; and, in that case, we may be certain that there can not be any universal rules of conduct, but that conduct will always have to be adapted to the special conditions under which men live. Moreover, there will not only, possibly, be many ethical standards, but none of them will be static. Men hate change almost as much as they love it, and it is a risky business to announce beforehand that there *may be* no absolute abiding-place for the soles of our feet; but the quest of the scientific in ethics is not for the timid.

IV

One of the few reviews of Durkheim describes his work as nominally sociology, but actually ethics; and it has been an objection to the case method that it is nominally ethics, but actually sociology.[18] There is no need to be disturbed by criticisms so little integrated. "The way to resume is to resume," said a trenchant personality of specie payment, after the Civil War. The way to make ethics a science is to begin the work. The many controversies of the past ages have done little to teach men how to behave wisely in society. Controversy will never do this. There is a certain amount of destructive criticism in-

[18] Cf. Lévy-Bruhl, *op. cit.*, pp. 64–65.

separable from any new enterprise; and all criticism is deemed destructive by those criticized. But there comes a time when it may fairly be demanded of those who criticize an older order that they do something constructive. It has seemed to me that I could aid the cause of this new science, which is not mine but that of all who think with me, not by further critical statements of what ought to be done, but by doing something, however slight, in the way of exposition. Hence the greater part of this volume consists of cases of conduct so arranged that they speak for themselves; so certified that they are not *my* examples merely, but the examples of all who care to use them. A certain vagueness and formlessness is inseparable from such beginnings and must be anticipated and forgiven. Nothing could have seemed a more unlikely subject for science than the weather; but meteorology is playing an increasingly important rôle in modern life, even in commercial life. We may laugh at the weather man but when storm signals are up we run for harbor or get in our hay as fast as possible.

This science of ethics will make great use of sociology with its tremendously valuable and significant array of facts about the influence upon conduct of geography, of race, of climate, of economic conditions; with its statistical method so admirably developed. The embryo sciences of criminology and penology, offspring of sociology, will be especially valuable, but none of these is ethics. *The nature of a science is determined, not by its material, but by its purposes.* All sciences

must study bodies; there is nothing else for them to study. Science is necessarily materialistic *qua* science. For it the classic rule is Hobbes's "All that exists is body; all that occurs is motion." But this materialism must not be misunderstood. It is not the final philosophic word, it is only a method; and this method can apply only to bodies. Ethics will study the *attained results* of sociology and like sciences in order to know how individual men — not their wills or personalities, but the men as organisms, — act upon one another: and also how various groups — not their principles avowed or tacit, but the groups as groups — act upon one another. We want to find out what the individual Thomas Brown did to John Smith under various conditions, what France did to England, or the United States to Panama; and this in their total relations, for, as has recently been said of biology, the entire organism must be considered.

We want also to find out what were the judgments of the group to which they belonged, for the purposes of the judgment, through the recognized authorities of that group. *Every group to which any man belongs has already, in some fashion, formulated its definite ethical standards,* whether those of church, state, municipality, or of family, race, or merely a social or political club.[19] Any infraction of these standards is an offense against the group and is pun-

[19] "Morals are 'givens.' It is a fact that for the average consciences of our civilization, for example, certain ways of acting appear obligatory, others forbidden, still others as indifferent. There is no room for 'edicts' determining the rules of moral prac-

ished, as any signal devotion to them is rewarded, in a conspicuous fashion. These judgments, for the state, are formulated in the decisions of courts; and law today is not only studied, but taught by the consideration of these particular judgments. At least it is so taught in the United States. Any widespread scientific consideration of ethics, however, must not only study cases as in the United States, but it must also study the judgments made in those countries where the Roman Law is the model rather than the Common Law of England and her dependencies. There is an evident analogy between the method of the Roman Law and the method of intuitional ethics. The case system in ethics must follow, primarily, the case system in law of this country. *Its use of cases,* however, will be for a quite different purpose. It will not be concerned to differentiate between first and second degree murder, between burglary and larceny, between grand and petit larceny, between arson and accidental burning, etc.; *it will not deal with procedure as such*

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tice, in the name of theory. These rules are the same sort of reality as other social facts, a reality which may not with impunity be misconstrued." — Lévy-Bruhl, *op. cit.,* p. 99.

"For a normal individual, living in any society whatsoever, our own for example, there is imposed a social reality which existed before his time and which will survive him. He knows neither its origin nor its structure. Obligations, interdicts, customs, laws, even usages and conventions — he must conform to all these prescriptions under pain of divers sanctions, sometimes exterior to himself, sometimes internal, more or less determined, more or less diffuse, which yet make themselves felt in the most incontestable fashion by the effects which they produce and by the intimidation which they exercise." — *Ibid.,* p. 192.

at all; but, taking the identical facts in each case from the law records, it will seek simply to show exactly what happened, in what the offense consisted, what the authorities said about it, how far they held the person responsible for his actions and exactly what penalty was imposed. Cases should be taken chiefly from records of higher courts in order to avoid the obvious objection that many decisions of lower courts are reversed and are never considered to be *law.*[20] These cases will be grouped by similarity of offense and conditions; and great care will be taken to indicate whether a judgment was made a few centuries ago or at present, whether in England or America, whether in Massachusetts or in Arkansas, whether in a community dominated by strong religious or racial feeling or not, whether during times of war, or threatened war, or in times of peace. From law cases alone much is to be learned of those principles *which actually do govern men in society.*

But a supplementary and more difficult field is to be investigated next; more difficult, not in essence, but because, in it, it is harder to get at the facts. I refer to the judgments of groups whose records are not

[20] The Supreme Court of the United States of America has reversed itself — The House of Lords has probably done the same thing. There is no conceivable decision which will not conceivably be reversed. We can never be sure that we have reached the final irrevocable decision. This is simply a matter of fact, of observation. It is possible, of course, that some decisions never will be reversed, but we cannot know this. The bearing of this fact upon a theory of knowledge is quite obvious; but the fact itself needs no apology. It is theories of knowledge that need apologizing for.

carefully kept and are not open to the public, such as the actions of corporations, of churches, of educational institutions, of families, of private clubs, and loosely knit social or political groups. These are not compelled by any law to keep accurate records. When some action of theirs is of so serious a nature that they are sued, either by civil authorities or by private persons, their records are often found to be incomplete or to have disappeared altogether. Officers prove to have faulty memories. "I don't know" is a frequent answer to questions; and the suspicion in the minds of court and general public that the man is lying has no immediate cogency because it can not be justified. Groups of all kinds, through their appointed officers, frequently give no reason at all for their actions, denying the pertinence of an inquiry, or else assigning reasons evidently false, but not provably false.

How shall we get at the real judgments of groups which have no formal records, or whose records are notoriously inexact or untrue? One way is to use our imaginations, — if we have any, — use the artist's method of painting *what we see*. This might be of value if there were any way of getting rid of the personal factor. That there is no such way at present known is obvious. Robert Browning's great poem "The Ring and the Book" is probably the greatest psychological study that has ever been made of the various judgments of different people upon the same set of facts — and it requires a reader of more than usual sympathy, patience and discernment to discover

what it was that Browning, even, took to be the ultimate truth of the Pompilia tragedy. Such a method can have no scientific value at all.

The search for judgments must be pursued with scrupulous care. The "heart" motive may only be studied by the psycho-analytic methods of Freud, — unsatisfactory, like Touchstone's Audrey, but the best we have.

These are difficulties, but they are not greater than the difficulties which anatomy, physiology, and histology have to face, and these latter have successfully surmounted many of their obstacles. Then, finally, there are the loose, floating, intangibles; like gossip, "public opinion," etc., which are chiefly valuable as clues, since they can not be presented in evidence.

I have elsewhere called such a study as this, *the physics of ethics.*[21] *The study of cases of conduct, as above outlined, must, in my judgment, form the core of any future scientific ethics. It is the proper beginning and logically precedes other studies contributory to such a science.* Such a study of cases by no means excludes the work of Professor Sharp which, while casuistical in character, is yet always dealing with actual cases referred to the tribunal of the conscience, rather than to any external authority or power. The authorities of groups generally mete out the same rewards and punishments to members, regardless of

[21] I find that this expression is practically used by both Comte and Lévy-Bruhl. I used it in the first article I wrote on this subject in ignorance of that fact.

their ethical standards or ideals. The theory is that this is always done, men are equal before the law; but in fact there are many exceptions. For example, Quakers are nearly always excused from military service or police duty while no such tenderness is shown to Presbyterians or Methodists.

Next in importance comes the study of biological facts — not, necessarily, of biology as such. Suppose that one has some ideal of human conduct, such as Jesus or Socrates or the Magnanimous Man of Aristotle or the Stoic Gentleman, and wishes, not only to conform his own life to it, but also to bring about an approximation to it on the part of society. He has been brought up under a psychology which assumes a *will*, separable from the body and not subject to the laws of the body. He assumes that such a will can be changed by appeals, by the force of example, by submission, turning the other cheek, etc.; and there is just enough truth in these generalizations to make them plausible.

Now let such a man make a comparative study of the nervous system. He will discover that there can be no action and no thought, since thought is an action too, without a definite reaction of the nervous system to a stimulus which must always be *initiated* from without the organism.[22] Moreover, while all human organisms are more or less alike — in fact, very much

[22] More exactly, from without the nervous system. The initiated will not need to be told what I mean and I do not want to clog the argument with an explanation here.

alike — nevertheless there are characteristic differences between them; and, given the same stimulus, there will inevitably be different reactions — including thoughts — especially if one or other of these nervous systems be abnormal.[23] He will find that, if there are certain lesions of the brain, or certain diseases of the spinal cord, there are whole ranges of action — and thought — utterly impossible to the being thus afflicted. This is not imagination; the psychopathic wards of our hospitals are teeming with corroborative material. And, so far as I know, there is no remedy for any affliction with such a basis.

The bearing of such facts as these upon a science of ethics, upon questions of *what duty and responsibility are,* is all too plain. But, some one may object, we have always held free from responsibility the very young, idiots, and the insane. There is nothing new in this. No, nothing essentially new, in very truth! It is strange, however, that so few have ever considered its significance. It has been there to see for centuries; but now, the careful observations of responses to particular situations, coupled with minute autopsies of the unfortunate, have made it plain to the meanest intelligence that *there are hundreds of thousands of human beings who can by no possibility ever do what is expected of them by society.*[24] Society must give over expecting such things.

[23] I am omitting, for the sake of clearness again, any reference to the influence of the total organism; but this can not be omitted in any complete account of the matter.

[24] Cf. Lévy-Bruhl, *op cit.,* pp. 261, 262.

Compare now, with such facts as the above, the equally striking facts uncovered by sociological plus biological studies of the effects of heredity and the possibilities of eugenics. Take the hackneyed comparisons of the Juke family with its terrible fruit of criminals, prostitutes, and degenerates to several generations and the Jonathan Edwards family with its glorious fruit of scholars, publicists, philanthropists, successful and honored men of affairs, and one sees why some men are praised and exalted and others are abased. The working out of the Mendelian law is one of the most significant things in the history of biology; an apparently inexorable process is indicated. The theory that, by an appeal to the will or by the grace of God, the meanest wretch may turn to a life of righteousness and honor, vanishes in thin air.

The modern comparative study of religion and of religious psychology has brought to light many facts of great importance for a science of ethics. It is quite apparent that, however different men's reactions may be to the same stimulus, yet, given a group training of one kind, it is quite as easy for men to grow up with the religious ideas of Mohammedanism, Buddhism, Christianity or Paganism, to be Presbyterians or Roman Catholics or Jews; and that the consciences of men are dominated by the traditions in which they have been bred. One finds criminals and saints among all these classes. Their consciences justify them according to the religious, ecclesiastical, political, or social traditions of their environment.

This is the proper place for the study of casuistry — as objective as any study, under right conditions. But, again it may be objected, the "normal man" will act always and can act always, according to duty. Who is the "normal man" and how is normality to be determined? Some one (was it Pascal?) once shrewdly remarked, merely from observing mankind, that we were all a bit mad at times. There is more than a little truth in this statement. And the studies in recent years by Professor Theodore Flournoy, of Geneva, and Dr. Morton Prince, of Boston, on multiple personalities, show how abnormality of still another kind may be found even in those whose nervous systems are not overtly diseased or defective.

Enough has been said to indicate the fields in which we may look to find new material for a scientific investigation of the problems of duty and of obligation; for it must never be forgotten that ethics deals primarily with such problems. Ever since man has been rational at all, he has learned not to hold responsible any one who could not help himself. Even the law, with all its rigidity and apparent brutal indifference to capacity, has recognized in principle, and in occasional practice, that some people could not be punished by the state because, in strict fact, they were not *persons*. And now we are learning that the number of those who are, either at times or all the time, irresponsible, is enormously greater than we had suspected. The discussion of what to do with them belongs under Ethics as an Art, to which we now turn.

V

The ancient controversy over the relation between the theoretical and the practical will not be here revived. It is a dead issue nowadays for all but a very few. All men recognize that the pursuit of "pure science" has brought in its wake untold practical blessings to the world; and most men agree that it is by the pursuit of "pure science" without ulterior commercial motive, that we are most likely to get these blessings. The dispute is settled by the discovery that there is no possible separation of the theoretical and the practical except in a purely formal way. Theory always eventuates in practice, practice becomes dull and inoperative unless constantly vivified by theory; and, moreover, it always proceeds upon some theory.

Scientific ethics is, potentially, applied ethics. Mankind would be very little interested in ethics if such a study were not expected to have very definite practical effect in influencing the conduct of men in society. The Robinson Crusoe-Alexander Selkirk kind of speculation regarding the possible morals of a solitary being who must always remain solitary, is idle and vain. It may be left safely to those who like it.

Now, given the ethical theory of any people, race, state, or church; these have not done so badly in application. The "line upon line, line upon line, precept upon precept, precept upon precept, here a little and there a little" plan is admirably effective — up to

a certain point. The force of example, leading to imitation; the power of secret orders, and the influence upon the imagination of initiations, sacraments, and decorations, the importance of taking men while they are young and plastic if one would mold them to any pattern, — these have all been well known, though not scientifically known, to the past ages.

There are many practical devices for influencing men to follow any particular ethics, which grow out of the studies indicated in section four, above. There are — according to the newspapers! — operations upon the skull which turn criminals into honest men. The thing is at least plausible. The mere investigation, by competent school physicians, of the physical condition of children, with especial reference to sight, hearing, and the presence of adenoids, is worth much moral preachment and persuasion; and is more generally effective. The study of the hookworm disease [25] and the campaign for its eradication by the Rockefeller Foundation have moral consequences absolutely incalculable and all for good, if we do not criticize the accepted standards of our generation; probably they are for good on any standard.

But by far the most important agency for bringing about any scheme of ethics already existing and accepted is that which is revealed in Professor Edwin B. Holt's little book, "The Freudian Wish." This book

[25] For a statement regarding the beneficial effects of biological study, see the presidential address of Dr. C. W. Eliot in *Science*, December 31, 1915.

contains a good deal of Freud and more of Holt, while the combination strongly suggests Avenarius. *The mechanism of the will is clearly revealed.* The method by which the will may be trained and modified is brought into the light of day and shown to be in perfect harmony with what has been intuited by the best minds of the past. The old phrase, "As a man thinketh in his heart, so is he," is shown to have neural and muscular basis. The ancient conception of the will as something entirely apart from neural paths, motor tendencies, and bodily "sets," is overthrown. Incidentally, there is much light shed upon the problems of choice; the idea of unmotivated, i.e., uncaused choices, is discredited — not by dialectics, but by a demonstration of the method of all conation. In my judgment, it not only points out how wills may be modified, checked, or suppressed, but it "scraps" that ancient and hoary "freedom of the will" which has been called the "freedom of indifference" — free to do anything at all regardless of the ancestry, character, or present situation of the person supposed to be in possession of it. Professor Holt's book is not a manual of practical ethics; but it contributes notably to our knowledge of how to make such a manual.

Much is known today of those influences which disturb, impair, or destroy altogether the neural mechanism without which there can be no training. This material has never been brought together in any form to make it available for ethical practice. To bring it together in definite fashion would be a valuable ser-

vice. I refer to what is known of the influence of alcohol, for example, upon the system — *what is known,* not guessed or projected by the perfervid imaginations of prohibitionists; of the effects of various poisons and drugs; of the influence of various foods upon types of organisms; of the destroying effects of fatigue, especially upon those charged with the public safety, such as railroad signalmen, locomotive engineers, chauffeurs, officers of steamships, and the like. We may add also the effects of undernutrition and of anxiety as well as of over-nutrition and idleness.[26] Then there is a different kind of influence upon which there is not at present much accurately known, which may be indicated, viz., the influence of the economic struggle.

If I have seemed, at times, to cross the line between science and art, it is not to be wondered at; for there is no sharp delimitation to be made. It would be perfectly proper to consider some of the subjects just mentioned under either.

It is manifest that *the art* of ethics can be practiced only when one is sure of his ethics. The relation between ethics as science and as art has been admirably treated by Dewey and Tufts.[27] The practical aids which I have mentioned or indicated will be equally useful for all ethical systems, for they simply help to carry into effect the various principles; and

[26] Cf. "The Biological Point of View in Psychology and Psychiatry," E. Stanley Abbot, *Psychological Review,* March, 1916.

[27] Ch. XVI, § 4, "The Place of General Rules." Cf. A. F. Shand, "The Science of Character."

every one of them has been foreshadowed in the proverbial sayings of mankind, although every proverb has, as it were, an *anti-proverb* which needs to be considered.

VI

To summarize:

1. Ethics can be and will be treated as a natural science.

2. To insist upon its normative character is to darken counsel and keep it from being studied in any fruitful way. If normative in the absolutist and aprioristic sense, it is impossible to study it as a science at all.

3. The case method, which is in social sciences the analogue of the laboratory method, must be used for the discovery of ethical laws. It is not casuistical, since it does not assume a knowledge of these laws *ab initio.*

4. The *results already attained* by many sciences, notably, biology, anthropology, and sociology, with their subordinate divisions, notably, psychiatry and economics, will be used for the purpose of discovering what man *can do.*

5. The influence of what may be called *social heredity,* through racial, national, and religious traditions, will also be an object of study as well as casuistry properly so called.

Since this science is but just conceived, we must remain for a long time on the basis of various traditional or accepted ethical systems. To apply them

better and make them more effective, modern knowledge contributes much, notably, an acquaintance with the mechanism of the will through Freud, Holt, and Avenarius.

Such an undertaking as has just been outlined will necessarily meet with neglect or with opposition, criticism of an unfriendly character and misunderstanding. It is, at any rate, an honest attempt to find light in a region where there has been much darkness. It can not hurt any moral imperatives to have them investigated. If they refuse to "show their books" one will indeed suspect them.

At a time such as this, when myriads of men have lost their ethical moorings in the great tidal wave which has swept over the world, it is wise to examine ourselves and our situation in life; to see if there is anything to which we can hold fast in the wreck of worlds and cultures; to ask whether we have any ideals which can be held in the face of all the facts; and finally, to ask how we shall act so as to make those ideals incorporate. For when one has once found his ideals he is a propagandist; and he must fight with every weapon he can seize or forge to make his ideals prevail.

CHAPTER II

THE EMPIRICAL USE OF CASES

I

I HAVE elsewhere[1] told of the manner in which I came to experiment with the study and teaching of ethics by the Case Method. Some of those details are irrelevant here but others need to be set forth.

The first thing that needs emphasis is that *one does not assume that he knows what right conduct is.* That is the thing to be sought. The teaching of law by the Case Method dates back about forty years. When President Eliot was introduced to explain the formal adoption of this method at the Harvard Law School, he said:[2] "Professor Langdell told me that law was a science; I was quite prepared to believe it. He told me that the way to study a science was to go to the original sources. I knew that was true, for I had been brought up in the science of chemistry myself; and one of the first rules of a conscientious student of science is never to take a fact or a principle out of second-hand treatises, but to go to the original memoir of the discoverer of that fact or principle. Out of these two fundamental propositions — that law is a

[1] Cf. "The Case Method, in the Study and Teaching of Ethics," *Journal of Philosophy, etc.* Vol. X, p. 342.

[2] *American Law Review,* Vol. XXII, p. 18.

science, and that a science is to be studied in its sources — there gradually grew, first, a new method of teaching law; and, secondly, a reconstruction of the curriculum of the school."

Professor J. C. Gray, writing later in the same *Review*[3] said: "The best material for a legal education would be real cases. . . . The method of study by cases is the best form of legal education that has yet been discovered. It is the best because it is most in accordance with the constitution of the human mind; because the only way to learn to do a thing is to do it. No man ever yet learned to dance or to swim by reading treatises upon saltation or natation. No man ever learned chemistry except by retort and crucible. No man ever learned mathematics without paper and pencil."

It is to be observed that Professor Gray is here speaking especially of the value of the case method in *teaching* law. Whether the case method is used in law schools *for the purpose of discovering what law is* may well be doubted. It has been doubted; and a very acute critic of this method, whether used in law or in ethics, has declared that such studies are essentially casuistical. It is assumed that one knows what the law is; the cases are used simply that one may find the exact place in legal teaching where each case belongs. The case study, he claims, is not an unbiased, empirical, inductive attack upon the problem, What is the law?

[3] *Ibid.*, pp. 756 ff.

Doubtless much might be said for this view. In the recent decisions of Courts under the Employers' Liability and Workmen's Compensation Acts, it is plain that the procedure is largely casuistical. Whatever ingenuity is employed, is devoted to fitting the case in hand to some particular aspect or interpretation of the statute. But this is inseparable from the interpretation of statute law. The statute is mandatory. The court's business is simply to find out whether the statute applies; [4] and in doing this it is quite customary to revert, for comparison, to cases under the Common Law — since these have been used, invariably, in the early interpretations of statutes.

II

But I am not here concerned to defend the Case Method in the study of law. I am sufficiently indebted to it for the idea of studying ethics in this manner, and, whatever the law purpose, *my* purpose is clear, viz., *to investigate through a study of actual behavior, what are the moral principles upon which men conduct their lives.* It is a study of what *is* rather than a study of what *ought to be.*

Such a declaration as this promptly damns my

[4] Except where the question of constitutionality arises. Cf. for this a paper by Morris R. Cohen on "Legal Theories and Social Science," read before the New York State Bar Association in January, 1915, wherein Professor Cohen shows the considerable part that judges have in the interpretation and application of statutes and also in the making of constitutional law. It is generally acknowledged that Chief Justice Marshall played a great part in the establishment of constitutional law through his judicial opinions.

project in the eyes of most ethical students, since these insist that ethics is concerned with the *ought* exclusively. But the actual condition of things must be studied first; and since legal decisions have an objective character, I have chosen them as the most promising material to work with.

My thought has been sufficiently naïve. If we can learn more about animal life by studying actual animals than by reflecting in our closets on the essential nature of animals, is it not likely that, if we should study actual decisions of mankind in situations ordinarily called moral, we should discover something really worth while about morals?

We are accustomed to contrast the legal and the moral; and doubtless some things which are strictly legal most of us would consider immoral and some things of an exalted morality, by common consent, are certainly not required by the law. *But the body of law is the professed morality of states; and that which holds throughout generations and ages, essentially unchanged, may, without impropriety or exaggeration be called the actual morality of states.*[5]

Then too the law cases have the important quality

[5] An interesting and valuable essay might be written upon the morality of international law, comparing this latter, in the case of each nation, to the idealistic aspirations of individuals. For, as there is in strictness no international law as yet, there being no power which can enforce it, so, in strictness, there is no ethical behavior which corresponds to the vague aspirations of most men. This is found only in moral heroes, and the motive for putting such ideals into practice is nearly always, or quite always, a motive which has to do with faith rather than knowledge.

that they are complete and completely objective. The cases used for this study are, almost all, decisions of higher courts. I have endeavored to give a sufficiently full statement of the facts upon which decision is based; and always to give the decision, even if it be only the "Judgment Affirmed," "Judgment Reversed," "Case remanded for new trial," indicating which side has obtained the verdict.

There is no record published of those cases which do not go beyond the Trial Courts, cases which are not appealed. And even the *Federal Reporter,* which takes account of cases in the Circuit Courts of the United States, usually states only the law points involved and indicates the decision; it does not give any statement of the case. Sometimes, very often in fact, this is unobtainable without an expenditure of time and labor quite ruinous. But in all cases which come before courts of final appeal, whether the highest courts of individual states or of the United States, there is a summary of the facts of the case, agreed upon by both sides. Wherever a jury passes upon facts, the facts remain, for purposes of the judgment, whatever the jury has found them to be. That the facts may often be, in important particulars, quite other than the jury found, does not invalidate the judgments passed upon them by courts.

Lawyers are accustomed to distinguish sharply between *obiter dicta,* things said by the Court as an explanation of its mental processes in coming to a judgment, and the judgment itself. Of course, the

more important thing is the judgment. The boy whose father tells him that he is greatly pained to be compelled to punish, is more interested in the fact that the punishment comes just the same. If courts keep on condemning murderers and thieves, it would be little to the point if their *dicta* favored these classes of criminals.

One of the criticisms passed upon my first proposal to study ethics through cases, was that this would be a study of opinion. It is rather a study of *opinions;* but opinions backed by the full "majesty of the law" and all the power of the state. When the Supreme Court of the United States dissolves the Standard Oil Trust, so called, the opinion of the world may be manifold in nature; but this dissolution did in fact affect the conduct of the Standard Oil Company enormously; and it does not matter in the least for our purpose whether this increased or diminished its profits. That is a matter, possibly, for sociological reform. The decision of the Court was an enormously important *act.* We lose sight of this fact because no force was necessary to bring about the dissolution.

As in the famous case of the Pullman Car Strike, the strikers themselves declared that it was not the military force which broke up the strike, nor any other force; it was simply the power of the United States Courts; so every court decision is an *act* of overwhelming importance. It is a *thing* to be observed like a chair or a table, with as much objective significance for us as chairs and tables. Doubtless the ques-

tion of the purely objective character of chairs and tables is not one which is easily decided. But, as one does not take a long course in philosophy before he studies chairs, tables, amoebae, cacti, or coleoptera, so one need not solve the question of subjectivity before he makes use of social facts.[6]

III

The question, where to begin, belongs properly in the next chapter where there will be a brief discussion of method; but it belongs here too. It will be obvious that many of my cases are taken from contemporary life. In this first attempt at a Case Book, I might perhaps be forgiven for taking the easiest way even if it were not the best way; but I am convinced that to begin with the study of contemporary cases, easily verified, is scientifically sound. I would indeed have confined myself entirely to cases in our own country and, within those bounds, in the State of New York, had I been able to find the variety of cases desired, which were adjudicated and reported. But many of the principles of the common law which have now become incorporated in our statutes and constitutions, are exemplified only in English and early American cases. This rapid disappearance of the common law through the incorporation of its principles in statutes is a matter of very great interest.[7]

[6] Compare for this the work of E. Durkheim, especially "Les Règles de la Méthode Sociologique," Chap. II, "Règles relatives à l'observation des faits sociaux," p. 20 f.

[7] "There is little legislation that is original. Legislatures imi-

Another reason for choosing present-day cases, and for not making a comparative study of decisions in the different states, is that the decisions of New York and Massachusetts, for example, may be taken as representative of the best decisions of the whole country, furnishing a standard which is more and more approximated from year to year.[8] An examination of the points of cases under the well-known captions, in Digests which cover the entire country, shows that a comparative study of the statutes of the different states of the Union would be a waste of time; but it may not be amiss to dwell for a moment on the difference between statute and common law on the one hand, and the real practise of the people on the other.

Professor Ehrlich,[9] speaking of the variance between

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tate one another. One may number on his fingers the landmarks of legislation in common law jurisdictions, and copies or adaptations of them have gone round the world." — Roscoe Pound in *Columbia Law Review,* 5:343.

[8] A layman in the law thinks that he observes a deterioration in the quality of judicial decisions since these have been confined largely to the interpretation of statutes — because statutes are nowadays so explicit. And what will be the effect upon legal education? The Case Method in law would seem to be doomed, and a study of statutory enactments with an investigation into their enforcement would take its place.

[9] Professor E. Ehrlich is the distinguished investigator of what he has called the "living law" who, before the Great War, was teaching and investigating at Czernowitz in Austria-Hungary. One of the minor losses, from the ordinary point of view, a major loss from the point of view of science, caused by the Great War, is the interruption or destruction of his studies among the numerous races of that interesting district. For the quotation I use, cf. Schmoller's "Jahrbuch," 1911, p. 136.

the law of families in France, particularly as concerns women, and the *facts,* says: "Whether the law has lost control over life or perhaps never had it, whether life developed away from the law or never corresponded to the law, may be set aside; but science fulfills its task as teacher of law (*Recht*) very badly if it barely presents what the statute (*Gesetz*) says and not also what actually occurs." He seems here to be making a distinction between law as commandment of a law-giver, whether individual or legislative body, and law as a description of what invariably happens. The thing which we are looking for is law in the latter sense; and some who agree with our desire to find this natural law will be surprised to find our constant citation of cases decided under Common Law and statute law.

Let there be no mistake about our position. *The declaration of the conscience of the state in its constitutions and statutes is indeed explicit; but the exposition of its real purposes is found in the way in which these statutes and constitutions are interpreted and enforced.* The most common and obvious cases of neglect or betrayal of statutes are in the neglect of numerous sumptuary laws, "Connecticut blue laws," the constitutional guarantee of manhood suffrage in states south of Mason and Dixon's line, and the like. A recent glaring case was ignoring the laws against betting on elections, which disfranchise all who should make wagers on the result. In the Presidential election of 1916 many millions of dollars were openly

wagered on the result of the election and the names of prominent bettors were printed in the newspapers. An editorial calling attention to this was printed in the *New York Times;* but no one was prevented from voting and no one dreamed of arrests. Many statutes die of inanition every year. But the cases which come before courts of final appeal are not based upon such statutes. There is a *hard core* of public sentiment which is indicated in the recurrence of certain types of cases, which I have given in the classifications which follow.

But here we find another difficulty, another lack of frankness, more evasion. Nothing could be nobler than the sentiments expressed in many a judicial opinion; but those who have known the inside history of the cases have known also what a miserable travesty of justice was there. *The law* can be the biggest Pharisee on record. In adherence to the letter it can murder justice. This is a commonplace. It would not be worth uttering except that it must be taken into account in weighing some of the *dicta* cited. Some day there should be a statistical account of decisions of certain types — say in murder cases — with a curve plotted. When that day comes, the statistics should be based *wholly on the decisions,* with no attention paid to the *dicta,* which are always full of noble and sometimes Pecksniffian sentiments.

Again we must observe that many of the decisions of the courts would be noble not only in sentiment but in fact, if the facts upon which they were based

only happened to exist. Given the facts before an Appellate Court, the principles upon which the decisions are based are often beyond reproach. The trouble has been that a jury has decided upon the facts and, under the obsession of the Anglo-Saxon mind that there are no oracles equal to jury oracles, we think that a dozen men picked from among the less energetic and capable — for the more energetic and capable usually know how to escape jury duty — by the spiritual unction bestowed upon them through being drawn in a panel, are capable of deciding questions of fact in realms where the most expert intelligence is often baffled.

But this is a difficulty which I do not feel called upon to meet, here at least. It belongs to the reformers of legal procedure. A study of the public conscience has no concern with it until it becomes a "case," that is to say, until some tribunal of, say, the Bar Association, has passed upon it.

IV

Nor can we at present reproach judges that they do not give decisions upon the basis of what they believe to be the evidence rather than upon the basis of what a possibly ignorant jury may have reported. Judges cannot go back of this evidence if they would. There is no personal reflection upon them for this any more than for the dodo-like decisions which we find embalmed in past cases and even peacefully slumbering in present-day cases. If an awakening of the public

conscience takes place, that will be a fact; if it does not, the present facts are all we have to go upon. This seems to be a good place to try to make clear that *there is no underlying purpose of edification in this volume.* Nor is there any room for praise or blame of conduct. When I show a certain impatience with the archaic procedure of our courts I am doing nothing more than expressing the sentiments of the most conservative as well as the most radical of men. Everyone knows that procedure is in need of reform. *But I am not here trying to reform it or anything else.* I am simply trying to set forth in as coolly dispassionate a fashion as possible what the decisions of our tribunals are. There are many tribunals, as I have indicated above.[10] These tribunals of families, clubs and partnerships, which are more elusive, I have set aside for a future day or for another worker in this field. For myself, and as an indication of what this study should be, I have chosen the decisions of the law courts and *I have no slightest interest in whether they are right or wrong, good or bad, so far as this study is concerned,* any more than a physician would get in a temper over a fever or a chill and praise a patient for returning to the normal.

In class-room work I have not allowed the use of the word *ought* at all as indicating a course of conduct which student or instructor deemed right. We are here seeking to find out *what oughts* there are, i.e., what duties society has declared to be owed to it.

[10] Cite passage in Ch. I.

These duties may be quite irrational, based upon ancient taboos. *N'importe! What are they?*

Edification *may* come later on, when enough shall have been discovered about the science of ethics to enable us to begin to build up an art.[11] We know nothing yet. Besides, edification always assumes that what ought to be is known, the only difficulty being how to bring it about. It has often been asked whether men are interested in the purely theoretic study of anything — whether there is not always some practical purpose either in the background or else openly avowed. It does not greatly matter what answer we give to this question. It depends largely upon temperament and training; but one thing seems evident to me, in this connection, which is of the greatest importance. There are great underlying powers of mankind which, if we could reach them and utilize them, would revolutionize society. Their using belongs in the art of ethics; their discovery belongs to the science. Pope's hackneyed line recurs because it is so much truer than that dapper thinker thought: "The proper study of mankind is man." Men have scratched the surface of society with their theologies and their philosophies — *man* has marched along sublimely regardless of them all. We still study history obsessed by these theological and philosophical prepossessions and are as blind to the facts as an Aristotelian naturalist before the days of Cuvier or Buffon.

We tried a few years ago to estimate the economic

[11] Cf. "The Case Method, etc.," *op. cit.*

resources of our country, to use them in case of war. This is of an importance which I would not minimize; yet it is a truism to say that, could we learn how to utilize the great underlying ethical powers of man, they would have a value compared with which all the economic forces were as nothing. And the philosopher's stone is as useless here as it was in the physical sciences. A patient study — arduous, long continued, disappointing, but finally rewarding — is all that will ever give us access to those untouched "energies of men" of which the great William James dreamed.

Now our enterprise may be an entirely futile one but let it at any rate be known for what it is. Lévy-Bruhl has said that the *science des moeurs* will not itself be moral. That seems an excellent statement of the case. As we can investigate logical relations and build up a science of mathematics; as we can investigate neurones and dendrites and receptors, etc., and build up a science of neurology; as we can study the forms of all living things and build up a science of biology; so we believe that a study of duties, obligations, rights, powers, penalties and rewards, will lead us to a science of duty, obligation, right, et cetera.

V

There have been those who found in my programme for the study of ethics an attack upon *duty* simply because I excluded *duty* from employment as a term explanatory of that which we were seeking to define. This seems to me preposterous, but it is none the less

true. So I wish simply to state categorically that we are studying *Duty* and nothing else. We could hardly study that which we do not believe to exist. But we study Duty by way of "duties," and life is full of duties which we are not allowed to forget. To be sure, men like better, today to talk of their rights than of their duties; but it is another commonplace that for every right there is a duty. I have not relied upon Professor D. G. Ritchie's admirable book "Natural Rights" to justify my position; the cases cited will do that — but I might appeal to it with perfect confidence and I very gladly acknowledge the immense influence it has had on my thinking.[12] The cases chosen for use in this book all illustrate some definite obligation imposed upon men in society. Those obligations are the most definite ever imposed anywhere, since they even include the duties of soldiers in regular armies. The penalty for the infraction of some of these duties is death. Nothing could be less equivocal than these duties. Moreover, where different societies and different periods are indicated there is an opportunity to see whether, under similar conditions, similar duties are imposed. There can be no doubt that such is the case. The principle would become still more apparent had there been much effort made in this book to give a genetic sketch of offenses. That work must be reserved for another time, perhaps

[12] This has been rather in the way of corroboration than of incitation since I had come to the same general conclusions before reading Ritchie's book. For any one who will read it there can be no further belief in rhetorical Natural Rights.

for another investigator better equipped for that particular work.

This case book is a sort of cross-section of contemporary society's judgment about the obligations of its members to the group.

It is far from being a complete cross-section. There are sub-classifications given without any cases. Sometimes this is because the point made in classifying was obvious and uncontradicted, supported by a multitude of commonplace cases not worth quoting; but sometimes it was because I could not find in legal decisions any case bearing upon that point. This is in no way strange or unexpected. Case books on the law are usually very full in some parts, very scant in others, while the hiatus is not unknown. Man has not developed symmetrically in things moral and legal any more than he has in things physical. We look in vain for the Venus of Melos and the Hermes of Herculaneum when we go to the sea shore; and we look in vain for a well rounded system of social judgments when we examine the law. We must build up our ideal system from a study of actual parts where we can find them. We have that ideal in physical things and we have got it from the actual in every case. If the sculptors of genius took here a throat, there a brow, here a torso, there a leg or arm, and put them all together in such a fashion that the world wonders and loves and desires no more — but sighs because there are none in the flesh to compare; so we may take the procedure of one state at one time for the offense — if it be an offense

— of homicide and the procedure of another for the offense — if it be an offense — of adultery, and we may then build up an ideal state which will not have that character of utter unreality and extreme undesirability that we find in all Utopias from Plato's to Bellamy's and Wells's.

What the state — any state — requires of its citizens, it is the duty of those citizens to bring to pass if they would continue to live and prosper *in that state*. One may not find out what his duty to God is by studying the Penal Law of New York State; but he will be much less apt to offend his neighbor if he lives in New York.

A personal friend, not a philosopher or special student of this subject, but a lawyer of acute mind, has said that the Case Method of studying ethics might make clear to a man what he ought *not* to do, but it would hardly tell him what he ought to do; and it is unquestionably true that the state proceeds entirely by prohibitions, leaving a man's positive duty to his own impulses and innate dispositions. This fact may furnish us with a valuable clue to the nature of positive duty; but I have no wish to suggest any type of theory at this point. It does seem to me, however, that we can answer that criticism without much trouble, especially at this stage of our inquiry, where we are merely seeking to show the morality by which men do actually live with reference to one another as citizens.

If there is indicated a sufficient number of points,

we can plot a curve; and we don't need a great many points. It will depend, somewhat, on the nature of the curve. If a subject is *bounded* in any way whatsoever, its positive character, as well as its negative limits, appears, for if it is bounded only at certain points, it is obvious that the rest of its activity is unhindered; and that activity will depend entirely upon the nature of the thing which acts. The federation of states which went to the formation of the United States will furnish us with an example. The Constitution set aside certain things as the province of the Federal Government. In these respects all the component states must yield to the United States; in every other respect they were free *to do as they pleased.* Later in this book I state what seem to me the conclusions, positive as well as negative, which can be drawn from the study of the cases here given and indicated. But let me say that, however ambitious the programme of Chapter I of this volume, the purpose of the volume as a whole is distinctly more modest. This purpose is, to furnish examples of the cases which I have used for several years in the hope that, many persons being made acquainted with the method, and many observers set to work, there might grow up gradually a body of cases more truly representative and free from the bias inevitable to a single investigator.

I have not been conscious of any *parti pris* in this study; but it is quite possible that I may have been unconsciously guilty. I have not excluded any case

from consideration, so far as I know; and the classifications, while entirely my own in their present form, have been criticized, at my request, by many people — students, former colleagues and professional friends. In many instances I have adopted the criticisms which, while valuable and already recognized by me personally, do not call for further comment, since they have not changed the original nature of the book in any way.

In the following chapter, in an account of method, I explain how the classification came to be made and how the cases were originally found.

CHAPTER III

METHODS

Mill has said,[1] "Popular notions are usually founded on induction by simple enumeration. In science it carries us but a little way. We are forced to begin with it; we must often rely on it provisionally, in the absence of means of more searching investigation. But, for the accurate study of nature, we require a surer and more potent instrument. It was, above all, by pointing out the insufficiency of this rude and loose conception of Induction, that Bacon merited the title so generally awarded to him, of Founder of the Inductive Philosophy . . . physical investigation has now far outgrown the Baconian conception of Induction. Moral and political inquiry, indeed, are as yet far behind that conception."

Political inquiry has made considerable strides since Mill wrote these words; but, aside from the work of Lévy-Bruhl and the investigators mentioned above, moral inquiry remains about where it was. Induction by simple enumeration is then the first step; but even for this there must needs be a principle of inquiry, a heuristic to keep us from mere maunderings. These studies were originally undertaken in connection with a class in Dartmouth College, in the year 1911,

[1] "System of Logic," Vol. I, p. 361, 8th ed.

Drew University Library

on a frankly empirical basis. After deciding that *those cases should be called moral which were approved or disapproved by some group, with the implication of ability to have acted otherwise,* we sought in no way to judge the morality of their judgments. For example, the Irish of the Sinn Fein in many revolts of recent years may or may not have been justified in their apparent conviction that they owed no allegiance to Great Britain; that, though defeated, they could not be traitors; but, whatever our sympathies, this is plainly a case of moral conduct.

The class at Dartmouth was invited to bring in every sort of moral case imaginable; and during four years through which the study was pursued in connection with classes, a large variety of cases was produced, some important, some trivial, most of them taken from newspapers. Rude and tentative classifications were made, out of which grew the classifications which follow. It is important to note that the classifications were not even attempted until large numbers of cases had been studied to see what lines of cleavage were plainly apparent. Mill has somewhere said " The ellipse was in the facts before Kepler recognized it; just as an island is an island before it has been sailed around." The principle of division into cases relating to the Preservation of Life and Limb, the Preservation of Property, the Preservation of Security in the first two and the Preservation of Liberty, had no conscious basis in any Eighteenth Century theories. But, while undoubtedly influenced by these theories in subtle

ways, we believed that the classifications had their basis in the same sets of facts which we found. The third classification is distinctly new in any event and presents a view of conduct which I have found nowhere else. Mill says [2] " a preliminary work of preparation is performed on the observed facts, to fit them for being rapidly and accurately collated (sometimes even for being collated at all) with the conclusions of theory." Before there can be any of that genuine *science des moeurs* there must be a guess, a scientific guess, at the meaning of the multifarious facts. My guess was as follows:

Life is the thing to be defended at all costs, since *the first business of any organism is, to survive;* hence, the most seriously reprobated offenses will be those which threaten life.

Property — by which is meant private property, for reasons which I think are sufficiently obvious — is valued fundamentally because it ministers to life.[3] Hence, we may expect to find that offenses against property will be punished and reprobated in direct proportion as these (in the judgment of the owners of the property) threaten life.

Security in the possession of life and property is a good realized the more as society becomes more complex and developed. Offenses against security are essentially offenses against life, in the final analysis;

[2] *Op. cit.,* Vol. II, p. 502, 10th ed.

[3] The esthetic valuation of property has something to be said for it, but it is hardly fundamental.

but it takes a considerable degree of intellectual development to recognize this.

Liberty is a good even more characteristic of a developed society; and the highest form of liberty, the liberty of self-expression, will be valued only by the most sophisticated of peoples.

Cases under the three categories, property, security, liberty, culminating in liberty of opinion and speech, must all be taken to be but shadings away from cases of life. In the end all ethics is a question of survival of personality, linked to the survival of the body. "All that a man hath will he give for his life," but that life may mean the death of the body. The apex of my pyramid I have called *liberty of propaganda,* for if a man may not express *himself,* he might as well be dead.

This is a principle of inquiry solely. I have no wish to make it a Procrustean bed to which all cases must be fitted either by stretching or by cutting off. I have found some cases which do not, at first blush, seem to fall naturally within any of the categories; it has needed but a little more intense observation to see that they do indeed fit. A. F. Shand says[4] that "Mill conceived that the Science of Character should be 'founded on the laws of psychology' and should connect the many popular generalizations as 'the common wisdom of common life,' and calls them 'empirical' because they are based on experience, and distinguishes them from the scientific or 'causal laws,' because they

[4] A. F. Shand, "The Foundations of Character," p. 13.

are not universally true. They hold, he tells us, within certain limits, but we do not know what those limits are. The proverbs, ' When your fortune increases, the columns of your house appear to you crooked,' and ' Love is blind,' would be empirical laws in Mill's sense. They are true of a great number of cases but not of all. And of any new case we could not predict whether this would be an exemplification of the law, or an exception to it. But if we can discover why it is that Love is so often blind, or why it is that as a man's fortune increases he notices the defects in his property or imagines such as do not exist, then ' in the propositions which assign those causes will be found the explanation of the empirical laws, and the limiting principle of our reliance on them.' "

Now the study of cases alone, bare cases, cases which should indicate merely that one man had killed, stolen, betrayed, etc., and that society had done so and so, would lead us only to Mill's empirical laws; but fortunately, the cases usually include opinions which assign reasons on behalf of society for the punishments inflicted.[5] And while some of these reasons may be purely traditional, while there is a vast deal of mere copying of the opinions of preceding judges, there is always to be observed the influence of original minds upon old problems. Not the least significant thing about judicial opinions is the change which comes over

[5] Where statute law is very plain, and where the offense is of an old type like murder or theft, the opinions are usually not given. Either they are obvious or they must be sought in the social history which led up to the legislation.

them from time to time. And these opinions, justifications of society's behavior, are just so many attempts at theory. They are, moreover, the attempt at theory made by men who have observed and reflected much. Their opinions are interpenetrated with the generalizations, the attempts at true causal explanation, given by the great commentators on the law; the Cokes, the Fosters, the Austins, the Holmeses, philosophers of law.

If the presentation of cases as arranged in this book is of no further value, it will at least serve to clarify the ordinary judgments of society, upon what basis soever they are or have been made. It will have the value of glimpsing from a height the road which we have traversed. Its variation from the road we thought we were taking will be apparent.

II

For the purpose of this study we need not consider the atomistic character of individuals — since even the law does not. The boast of equity that all men are equal before the law, is not only contradicted by the greater use which the intelligent and the well-to-do may make of the law, but by the fact that there are many classes of people who cannot be held criminally liable — idiots, children and the insane. Still, within a given class, say of male citizens of New York State of full age and of sound mind, all are treated alike; they are treated as atoms. And as this is not a study of " the ought " but of " oughts " it is of distinct value

to observe that all are treated alike. If one man has influence — a "pull" with the court — and another can spend money freely, these are interesting facts which explain some otherwise inexplicable decisions; but they do not invalidate the professed morality of the state toward all citizens, nor the atomism which is not only latent but expressly stated in constitutions and declarations which proclaim the equality of all men. That this equality exists only in name I have indicated in the first chapter of this book. It would be no part of the purpose of the cases here used to say that all culprits before the law *should* be treated individually, for we do not use the word which implies an obligation not yet in force. It is part of our purpose however to indicate, however briefly, that the law already approaches this ideal in the giving of indeterminate sentences, in the establishment of Children's Courts and the creation of probationary officers.

III

My method is also frankly behavioristic in character. It *takes no account of frustrated or incomplete intents.* The man who hates may be a murderer, the man who lusts an adulterer; but unless the hate of the one or the lust of the other has effect in a blow or a ravishment, the law of the land is indifferent. It is on this basis that Becker and the Haymarket Anarchists hereafter cited were condemned; that their influences were acts, observable by all men. The modern behavioristic psychology seeks to tell the nature of the mind

from the character of the organic acts. So we seek to know the conscience of the public through its overt acts. Where the State imposes no penalty the *State* is indifferent. It will be well to remember, however, that the individual does not go scot free merely because he never gets in jail, never is fined by a court. Our study would still be behavioristic if it extended to social ostracisms, etc., as it properly might do. There can be no social ostracism without an act, even if that act be merely a refusal to act.

It is obvious that we cannot use the method so common to laboratory work in other sciences, the method of experimentation; but, as Comte has said, that is unnecessary since history has done our experimenting for us. A study of origins and a comparison of social practises in various states and times with respect to similar offenses will give us abundant scientific material.

I am convinced that this study, even more than most, requires the meeting of many minds; and I have found great practical difficulty in getting aid from others because few if any scholars seemed to know just what I meant by "cases of conduct" until they had seen some of the actual cases used. Ever since the publication of my first paper on this subject in June, 1913, I have received requests from teachers of philosophy and others to publish cases. Now cases, to be really instructive, must be in considerable bulk; and the columns of philosophic publications have not been open to such bulky contributions. This book is

therefore published as soon as possible in order that by actual use in class rooms other cases may be found, specially those "negative instances" which Bacon rightly deemed of such importance. Law Case Books are very bulky affairs, containing hundreds of cases, set forth at great length. A future "Case Book in Ethics" should contain much more material than is here; but until many investigators are at work, that is hardly possible. I shall look too, hopefully, for drastic criticism of method, especially from teachers and students of sociology.

IV

I anticipate that the charge of sociology will be brought against this work; and it is indeed, in its present state, largely a sociological study. I do not yet put forth any ethical theory growing out of this study which would put me on my defense. But I reply in anticipation by referring critics to Durkheim and to Lévy-Bruhl, who are amply able to support the claim that social facts are objective whether ethical or other. And as all my purpose in this collocation of cases has been to present significant ethical facts for study, I may rest my case.

It may be asked, what principle of selection has been used? What guarantee has the reader that the cases here used are not abnormal cases?

There are no abnormal cases for such a study as this. The abnormal is sufficiently difficult to establish in any event, as economists have discovered in

the matter of prices; so that we may be thankful. James and Starbuck were accused by many of having dealt wholly with abnormal cases in their studies of religious phenomena, and Durkheim has been at some pains to define what the normal may be in sociology. We have no such difficulty, yet should this study by cases secure sufficient attention from students of ethics, doubtless the normal and the abnormal will eventually develop. At present we have not the problem. All is grist that comes to our mill. But we may at any rate note that the cases used as standards in all of our classifications are taken either from approved law case books or from constitutions and statutes, or from the decisions of the most eminent judges, though in some instances, for want of reported cases in a particular category, I have had recourse to the newspapers and to generally known conditions. They are not freak cases. We might indeed say that there is a normality of procedure in peace which is completely overthrown in times of war; we might say that decisions like that in the Frank case are abnormal inasmuch as race prejudice was so undeniable. I would prefer not to call either of these instances abnormal but rather to consider them the limits of ordinary behavior.

Finally, it is obvious that the method is the method of legal case study. Professor Powell has said,[6] " That

[6] Thomas Reed Powell, " The Study of Moral Judgments by the Case Method," in the *Journal of Philosophy, etc.*, 1913, at pp. 485 ff.

this system of case study furnishes valuable training in subtlety of judgment or of intuition, is generally conceded by those most familiar with it"; and he further enlarges upon its value for teaching, but he cites the "fond saying at the Harvard Law School that the case method does not teach us the law, but that it gives us the legal mind." I submit, with deference, that if this is not teaching the law, it is teaching nothing. While it may seem merely to be training men in a certain expertness, in what I have called *art*, it is clear from the character of the expertness that students have really learned the law itself, though, for particular occasions, they may find it necessary to look up authorities and cite decisions. I protest that the law is *discovered* in this fashion and I believe that, even from the few cases collected here, there may be gleaned a very clear knowledge of the great outlines of the morality actually practised in states. And, while it has been no part of my plan to write a manual for the teaching of ethics, it seems to me that the method set forth by Professor Powell in the article referred to may well be applied to teaching ethics by the Case Method.

I hope that this book may prove useful in class room teaching whatever any man's views of ethics may be. There is in it nothing of propaganda, except the idea. There is no position taken for or against any social reform. I have desired honestly to find out how states behave, especially our own State — the United States of America; and the Great Britain from which we de-

rive not only our Common Law but also our Common Morals. Such conclusions as I shall draw at the end of each large classification are sincerely deduced from the facts, so far as I know; and if these conclusions do not follow from the facts, I shall be most grateful to any one who will point it out or produce new facts which will otherwise invalidate my tentative laws.

In conversation with Professor Josiah Royce some years ago I humbly disclaimed any power to know the absolute Truth about anything; but declared my allegiance to a less arrogant and more satisfactory mistress, the Goddess Veracity. That great and lamented scholar laughingly retorted that she was a barren goddess. My answer is that she is barren only when not espoused.

I can think of nothing more likely to advance the well-being of mankind than a frank, sincere, unafraid scrutiny of its actual behavior. It is often painful to know that kind of verifiable truth; but it is generally — perhaps always to a sound and healthy soul — salutary. And I have some satisfaction in thinking that, whether my readers agree or disagree with the conclusions I tentatively draw, if they will but read the cases themselves and be incited, even by indignation it may be, to find others, my main purpose will have been accomplished.

PART I

PRESERVATION OF LIFE AND LIMB

PRECEDED BY

EXPLANATORY INTRODUCTORY MATTER

AND

A BRIEF HISTORY OF HOMICIDE

PRESERVATION OF LIFE AND LIMB

The cases which form the material for a science of ethics have a wide range of objectivity and, as I may say, of *density*. One can study only those cases which are characterized by overt and measurable action. Moreover the subtler cases of jealousy, malignancy, envy, and their converses, will always elude any kind of analysis except that of the great masters of fiction. We can learn more of human nature and its springs from Goethe, Cervantes, Molière, Shakespere, Dickens, Ibsen, Henry James and George Meredith than we can from any statistical study however profound and accurate. But these same subtler passions cannot exist without producing action which, sooner or later, brings about punishments and rewards in courts of law and other tribunals, tribal or familial, of a similar character. It would be as idle to expect to understand man as man by the study of the bony skeleton or of anatomy as to expect to understand his conduct from a study of that extremest form of it which results in his destroying another man or men. Yet as anatomy is fundamental, so is homicide.

The most serious of offenses in the present state of society, one whose punishment is usually the death sentence, is homicide. But the mere taking of life is not in itself and perhaps never has been the most serious of offenses.

Sacrilege[1] in many ages and places and treason always, in its extreme form of direct attack upon the integrity of a state, are more serious; but they cannot be punished more severely than murder. Indeed murder and high treason may be put on a par; though punishment of high treason was until a comparatively late date in England (1870) of a most barbarous character.[2]

We tend to form our moral judgments through epithets which praise or condemn. Murder and treason are, of course, murder and treason, i.e., we have no words of a severer kind, no things which are habitually condemned more fully; but the particular acts which are now called by those names were not always regarded in the same light — and we can see, in our own lifetime, changes coming over the judgments of men. Moreover, while we may pass statutes declaring that wilful, malicious and premeditated homicide is murder (following common law practice) and shall be punished

[1] But for this cf. Hobhouse, "Morals in Evolution," p. 76.

"Our *Leges Henrici* still distinguish emendable offenses, in which sacrilege and wilful homicide without treachery are included, from unemendable offenses such as house breaking, arson, open theft, aggravated homicide, treason against one's lord and breach of the church's or the King's peace."

Observe also that many of the punishments for what we would call murder contemplate no objection to murder as a sin but are merely precautions — a man has the death infection about him or the ghost of the slain is after him. It is well to avoid him or dispose of him in some way.

[2] Cf. for the whole subject of Treason the article on that subject in the Encyclopedia Britannica, 11th ed. There was, in its punishment, an attempt to carry over the punishment beyond destruction of the physical life into posthumous disgrace.

by death or by life imprisonment at hard labor or by some other punishment, the obvious state of things is that a great many people have unquestionably committed murder who are not thus punished — and society as a whole is not much disturbed, if at all.

And when one uses the word "society" in this way it is well to be somewhat more explicit. We cannot use the behavior of a tyrant to express the will of a society; rather should we observe the revolts against his will in the face of danger or death. Absolute monarchs may believe that they represent the will of God but it would hardly be an empirical study if we examined their conduct in order to find out what the will of God is!

It would be hopeless and useless to attempt to collate all the behavior of men with respect to homicide, for it is obvious that some of the worst crimes have been committed in the name of the law. The powerful can always override justice; but the time during which they can do this is usually strictly limited. *What we want to observe is the action of groups where there is the substance as well as the form of law, i.e., where, however ignorantly, the group lays down a principle which it could wish to see applied to every member of the group.* This throws light upon actual moral procedure. Let us guard, however, against too strict an interpretation of the word "principle." No one laid down principles until the days of the great commentators upon the law. The "principle of behavior" which was recognized as binding upon mem-

bers of a group may have any origin you wish. It could never be violated with impunity. What we seek is a natural history of Killing.[3]

Such a subject is large and might be handled, profitably, in many ways. Any ultimate study must take up the change in attitude towards Killing in the different races and nations. As a preliminary to such a study I submit the following brief outline of the history of homicide. Inasmuch as it is not my purpose to make a purely jural study, this outline must suffice. In the light of Professor Ehrlich's studies[4] in what he calls the living law, I question whether there would be any advantage in making a purely jural study.

An Outline History of Homicide

The facts in respect to homicide have been collected by many scholars, with a fulness which I could not hope to rival here even if it were desirable. Some of the sources are here indicated.

"Origin and Growth of the Moral Instinct," A. Sutherland; especially Vol. II, pp. 160–161.
"Origin and Development of the Moral Ideas," E. Westermarck.
"Morals in Evolution," L. T. Hobhouse.
"Evolution of Law Series," Vol. I, Kocourek and Wigmore.

[3] Cf. Stephen "Criminal Law (History of) in England," Vol. I, pp. 107, 108.

[4] Professor Eugen Ehrlich, an account of whose work may be found in an article by Professor W. H. Page in the *Proceedings of the Association of American Law Schools.* Chicago, 1914, p. 46.

"The Structure of Greek Tribal Society," H. E. Seebohm.
"The Tribal System in Wales," F. Seebohm.
"The Ancient Hebrew Law of Homicide," M. Sulzberger.
"Ancient Society," L. H. Morgan.
"A Manual of Greek Antiquities," Gardner and Jevons.
"Folkways," W. G. Sumner.

1. (*a*) The earliest times and primitive societies today either approve whole-heartedly or at least do not condemn killing of members of other groups, whether in war (when of course it is honorable) or in peace. The blood fine was paid when necessary to the injured group, or, in some cases, another person was handed over to be killed in the stead of the first killed. Blood feuds in some kind persists today in Corsica, Albania and the southwest of the United States of America.

   (*b*) Homicide appears to have been very rare within the group in early days — and is so now among primitive peoples. Among some there was the *lex talionis;* but generally the blood fine was paid to the injured family or to the tribe as a whole as represented in the person of the chief or king.

   (*c*) In the earliest codes — which represent a very advanced state of society — legal killing of offenders was universal and inflicted for a great variety of offenses.

   (*d*) Homicides are all of one kind — accidental and murderous killing pay the same penalty.

2. (*a*) The second stage may be illustrated by the case of the Hebrew people who, at least after the codification of their laws, recognized individual guilt; and gradually repudiated the blood fine. They also separated kinds of homicide and developed the crime of murder and blood guiltiness — though the idea of a Cain with the curse of man and God on him must be very late in Hebrew history.

(*b*) Here belong the homicides of Greek mythical history, wherein —though the idea of murder is not developed — guilt because of sacrilege for one reason or another was found.

3. Among the Greeks of a later time, intent to kill became necessary to the crime of murder. The penalty was death and confiscation of property if the accused chose to stand trial. He could withdraw before the end of the trial into exile — in which case his property was confiscated and he was exiled for life. A possible exception to the privilege of exile was the case of parricides.

For involuntary homicides, exile alone was the penalty, and small distinction was made between its different kinds. The involuntary homicide might compound with the next of kin of the clan and reduce his exile to a merely nominal thing.

It is a highly modern and sophisticated attitude here revealed; e.g., instigation to crime incurred the same penalties as murder — but for the murder of a slave all one had to do was to purify himself for religious reasons.

4. "In England under the Norman rule homicide became a plea of the Crown and the rights of the kindred to private vengeance and to compensation were gradually superseded in favor of the right of the King to forfeitures where the homicide amounted to a crime (felony)." "After the Conquest and for the protection of the ruling class a fine (called *murdrum*) was levied for the King on the hundred or other district, in which a stranger was found dead, if the slayer was not brought to justice and the blood kin of the slain did not present Englishry, there being a presumption (in favor of the Exchequer) that the deceased was a Frenchman. After the assize of Clarendon (1166) the distinction between the killing of Normans and Englishmen gradually evaporated and the term murder came to have its present meaning of

deliberate as distinct from secret homicide. . . . But at that date and for a long time after homicide in self-defense required a pardon. It was not until 1828 that the innocence of excusable homicide was expressly declared." [5]

5. The modern law of homicide is now a matter of pretty general agreement among the civilized nations. It is stated in *Commonwealth* v. *Webster*, *q. v.*[6]

The modern law makes no distinctions as to persons killed, fellow countryman or foreigner, bond or free; though extradition laws are not universal. The killing of any man for private reasons, not in the order of duty to the state, is a crime against society, though we shall see that the old distinction still holds as to foreigners and subject people, or those who have been subject, however attenuated it may be in practice.

The outline is given in lieu of cases under the different civilizations mentioned which cannot now be had. The law indicates the intent rather than the practise — and practise is much more significant than formal principles or edicts. For example, it is plain that the blood feud as nominally practised in the past — and even in our own Southwest — would result in the speedy extermination of the feudists.

We must remember also that no truly democratic or constitutional governments existed until modern times. The law, in its rigor, never held for privileged classes. The most striking example of this was that "benefit of clergy" which exempted all in orders, of any sort, from the temporal jurisdiction in England until a comparatively late date.

[5] Encyc. Brit., 11th ed.

[6] See below, p. 83.

I have not attempted to give any outline of the history of assaults, which are all lesser degrees of homicide; since they are always, when felonious, but incomplete attacks upon the person; though many of them are not intended to be homicidal.

The outline which follows is self-explanatory.

KINDS OF KILLING PRACTISED IN HUMAN SOCIETY

ILLEGAL

I. ***Always reprobated.***

- **Murder**
- **Manslaughter**
- **Killing by wilful neglect** (of which there are many forms, ancient and modern).

II. ***Sometimes reprobated, often not.***

- **Accidental** — In ancient times the thing or person responsible was punished. In modern times, no punishment except liability to damages under civil action.
- **Self-Defense** — In ancient times this was homicide like any other. In modern days it is approved.
- **Defense of others** — Same as Self-Defense. It is usually praised.
- **Suicide** — In former times generally considered sacrilegious. In modern times, no punishment, if successful.
- **Dueling** — Laws generally condemn, but public opinion divided. Punishment often negligible.
- **Euthanasia** — The merciful killing of the unfortunate. No laws permitting, generally condemned by public opinion.

LEGAL

III. ***Not reprobated by the group as such; but considered painfully necessary rather than attractive or honorable.***

- **Executions of all kinds** — The acts of hangmen, of judges and juries, executive officers, including police.
  - (*a*) Formal executions.
  - (*b*) Killing of prisoners attempting to escape.
  - (*c*) Shooting down rioters, quelling mutineers, etc.

SEMI-LEGAL

IV.

- **All the above acts** when done by Vigilantes, lynchers, Ku Klux Klan, etc.

DOUBTFUL

V.

- **Assassination of political tyrants** — Condemned and punished by the party of the tyrant but approved by many others.

APPROVED

VI. ***Praiseworthy.***

- **All killing of enemies in war;** But only within the rules of warfare.
- **Sacrificing victims in worship** — Suttee, etc.

SOME EXCERPTS FROM HISTORY

Solon, in "Plutarch's Lives"

"First, then, he repealed all Draco's laws, excepting those concerning homicide, because they were too severe and the punishments too great; for death was appointed for almost all offenses, insomuch that those who were convicted of idleness were to die, and those that stole a cabbage or an apple to suffer even as villains that committed sacrilege or murder." Draco had been asked why he made death the punishment of most offenses. He replied "Small ones deserve that, and I have no higher for the great crimes."

This is the sum of what is recorded about Solon. The implication is plain that homicide, probably with little discrimination, was punished with death — at least that such was the statute. There was no ransom for the slayer.

"Caesar's Commentaries," Book VI, Ch. XIX

"Husbands have power of life and death over their wives, as well as over their children; and when the father of a family, born in a more than commonly distinguished rank, has died, his relations assemble, and, if the circumstances of his death are suspicious, hold an investigation upon the wives in the manner

adopted towards slaves; and, if proof be obtained, put them to severe torture and kill them."

Tacitus. A Treatise on the Situation, Manners and People of Germany, Ch. XII

"In this council of the state, accusations are exhibited and capital offenses prosecuted. Pains and penalties are proportioned to the nature of the crime. For treason and desertion, the sentence is to be hanged on a tree; the coward, and such as are guilty of unnatural practises, are plunged under a hurdle into bogs and fens."

Ch. XXI. "Injuries are adjusted by a settled measure of compensation. Atonement is made for homicide by a certain number of cattle, and by that satisfaction a whole family is appeased."

The Tribal System in Wales

(F. Seebohm, Longmans, Green & Co., New York, 1895.)

(*P. 58, from the Gwentian Code*) "Three persons hated by a kindred; a thief, and a deceiver, and a person who shall kill another of his own kindred; since the living kin is not killed for the sake of the dead kin everybody will hate to see him."

Such a criminal as the last-mentioned, whose crime, being within his own kindred, was outside the law of *galanas* or "blood fine," could not be slain. He might, however, with the consent of his kindred, relinquish the privilege of kinship. (*Comment by Seebohm*)

(*Also p. 57, quoted from "Ancient Laws of Wales," II, pp. 315 ff.*) If a person be killed and his kindred shall not obtain right and his kinsmen proceed to avenge their kin . . .

(*P. 59*) By one thing alone could the tie of kinship be absolutely broken, viz., by a man's *life being forfeit* for crime, such as the murder of his chief of kindred. For such a criminal the gulf was opened and could only be bridged by his descendents . . . in the ninth generation. . . . In such a case the criminal was banished from Cymru, and "it was required of every one of every sex and age within hearing of the horn to follow that exile, and to keep up the barking of dogs, to the time of his putting to sea, until he shall have passed three score hours out of sight."

(*Pp. 104–105*) "The payment of *galanas* (blood fine) was . . . a matter between two kindreds." At first it may have been the subject of bargain between two kindreds. Later it became a matter of tribal law. "There was then, so to speak, the intervention of a kind of international law and authority, superseding the lynch law or blood feud between the kindreds."

(*P. 106*) "Even within the tribe and the kindred the value of one man's life was greater than another's."

(*Morgan, L. H., "Ancient Society." H. Holt,* 1878, *p. 95.*) "When a murder had been committed it was usual for the gens of the murdered person to meet in council (said of the phratries of the Iroquois); and, after ascertaining the facts, to take measures for aveng-

ing the deed. The gens of the criminal also held a council, and endeavored to effect an adjustment or condonation of the crime with the gens of the murdered person. But it often happened that the gens of the criminal called upon the other gentes of their phratry, when the slayer and the slain belonged to opposite phratries, to unite with them to obtain a condonation of the crime. . . . They offered reparation to the family and gens of the murdered person in expressions of regret and in presents of value. . . . The Grecian phratry, prior to civilization, assumed the principal, though not exclusive, management of cases of murder."

Kafir Laws with Respect to Murder

("Evolution of Law" Series, Vol. I, pp. 296 ff.)

Persons are considered the property of the chief.

Fines are imposed for acts of violence committed on the person — cases of "blood" are accordingly claimed by him, and the person or family, whose blood has been shed, receives no part of it. A man's goods are his own property but his person is his chief's. "No man can eat his own blood" is the maxim which regulates procedure; and as the fines levied for personal injuries are considered the price of blood, whoever shall receive any part of such fine in a case where he had himself been the sufferer, would be regarded as violating this maxim.

The penal sanctions of Kafir law resolve themselves into the general system of pecuniary fines, varying

according to circumstances from a single head of cattle to the entire confiscation of property. The exceptions to this are, cases of assault on the persons of wives of the chiefs, and what are deemed aggravated cases of witchcraft. These usually involve the punishment of death, very summarily inflicted. This punishment, however, seldom follows even murder, when committed without the supposed aid of supernatural powers; and as banishment, imprisonment and corporal punishment are all unknown to Kafir jurisprudence, the *property* of the people constitutes the great fund out of which the debts of justice are paid.

Personal influence and favoritism affect the amount of the fine.

Tambooki (Kafir) Usages

("Evolution of Law," Series, Vol. I, p. 315.)

There is little distinction between murder and any other kind of homicide. Compensation is insisted on even when a person charged with sorcery dies under official torture; and all fines go to the chief.

So with fights; and even death from natural causes unless the chief is formally and immediately made acquainted with the facts.

Among the Fantis

("Evolution of Law" Series, Vol. I, p. 328)

When a member of the family was sold or pawned he ceased to be a member and lost all his rights —

but he could be reclaimed and regain his rights — but "when a person through misconduct was *expelled* from the family, or was sold and got rid of by the family after due deliberation, he ceased to be a member of the family, even if his master gave him his freedom."

Illustration of punishment which is, by analogy, the same as death.

Ancient Times — Law of Hammurabi

(2250 [?] B.C.)

Killing a free-born man, penalty ½ mina of silver.

Killing a freedman, penalty ⅓ mina of silver.

For assaults, *lex talionis* and compensation, including case of death from assault.[7]

The death penalty is imposed for the following causes:

False accusation, or serious accusation not properly attested; selling stolen goods, robbing temples (sacrilege) — (sometimes, restitution 30 fold and if one has nothing to pay with, then death); kidnapping; burglary; highway robbery; malfeasance in office; getting a substitute (if a soldier) when on the King's business; rape; adultery (both parties to be drowned though they may be pardoned); remarriage of a woman whose husband is captive in war, unless she is forced to it by hunger; gadding about and extravagance; killing a

[7] Observe that this is not entirely consistent since the *lex talionis* would require a life for a life always.

husband (she shall be impaled); incest with a mother (both to be burned); negligence in building which results in death of owner (if it kill son of owner, son of builder shall be put to death; if it kill a slave, just give him another!)

Ancient Hebrew Law of Homicide[8]

The Canaanite law of homicide is inferred from the laws of Hammurabi (c. 2250 B.C.) which, although they antedated the crossing of the Jordan (1280 B.C.) by nearly a thousand years were yet "still studied in Assyria fifteen hundred years after publication and five hundred years after that were made a textbook in the Babylonian schools."

The Canaanite law then did not make the killing of a man a crime cognizable by the state, but a trespass, "which gave the family of the deceased a right to redress. There was no inquiry as to the motive, and there were no degrees of liability. This absolute right of redress . . . was the right to kill the perpetrator or an equally important member of his family . . . the blood feud or vendetta."

The Hebrew law declared that homicide could never be a trespass. It was an offense against God. Family interests in it were wiped out. Killing was not neces-

[8] The Hebrew law is familiar to everybody through the Old Testament. It has seemed better to me to condense a scholarly study of the law by a modern Jew than to go into the intricacies of documentary study, especially as the conclusions are so simple, so obvious and so inwrought in our entire social life.

(Mayer Sulzberger, p. 142 *et passim.*)

sarily murder. It might have been due to casualty, to misadventure, to an unthinking blow given in hot blood. It was then manslaughter and punished much as now. Murder was murder and punished with death. The wer-gild was abolished.

To make up the crime of homicide or murder there must be these three concurring circumstances:

" I. The party must be killed (anciently a barbarous assault with an intent to murder, so that the party was left for dead but recovered again, was adjudged murder).

II. The second consideration that is common both to murder and manslaughter is, who shall be said a person, the killing of whom shall be said manslaughter or murder.

If a woman be quick or great with child, if she takes or another gives her any potion to make an abortion, or if a man strike her, whereby the child within her is killed, it is not murder or manslaughter by the law of England, because it is not yet in *rerum natura,* though it be a great crime, and by the judicial law of Moses was punishable with death; nor can it legally be made known whether it were killed or not. So it is, if after such a child were born alive, and baptized, and after die of the stroke given to the mother, this is not homicide.

If a man kills an alien enemy within this Kingdom, yet it is felony, unless it be in the heat of war, and in the actual exercise thereof.

III. The third inquiry is, who shall be said a person killing? If there be an actual forcing of a man, as if *A* by force take the arm of *B* and the weapon in his hand and therewith stabs *C* whereof he dies, this is murder in *A* but *B* is not guilty. But if there be only a moral force, as by threatening, duress or imprisonment etc., this excuseth not.

Rape is an offense in having unlawful and carnal knowledge of a woman by force and against her will.

Robbery is a felonious and violent taking away from the person of another goods or money to any value putting him in fear.

Such hurt of any part of a man's body whereby he is rendered less able, in fighting, either to defend himself or to annoy his adversary, is properly a maim. . . . An assault is an attempt, or offer, with force and violence to do a corporal hurt to another; as by striking at him with or without a weapon; or presenting a gun at him at such a distance to which the gun will carry; or pointing a pitchfork at him standing within reach of it; or by holding up one's fist at him or by any other such-like act done in an angry, threatening manner, from whence it clearly follows that one charged with an assault and battery may be found guilty of the former, and yet acquitted of the latter. But every battery includes an assault. . . . No words whatsoever can amount to an assault.

Any injury whatever, be it never so small, being actually done to the person of a man in an angry, revengeful, rude or insolent manner, as by spitting in

his face, or any way touching him in anger, or violently jostling him out of the way, are batteries in the eye of the law." [9]

I. ILLEGAL — ALWAYS REPROBATED

Murder

COMMONWEALTH *v.* WEBSTER

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1850

(Reported 5 Cush. 296. Beale, 3d ed.)

THE defendant, professor of chemistry in the medical college in Boston, attached to the university at Cambridge, was indicted in the municipal court at the January term, 1850, for the murder of Dr. George Parkman, at Boston, on the 23d of November, 1849. The indictment having been transmitted to this court, as required by the Rev. Sts. c. 136, Sec. 20, the defendant was tried at the present term, before the Chief Justice, and Justices *Wilde, Dewey,* and *Metcalf.*[10]

The government introduced evidence that Dr. George Parkman, quite peculiar in person and manners, and very well known to most persons in the city of Boston, left his home in Walnut Street, in Boston, in the forenoon of the 23d of November, 1849, in good health and spirits; and that he was traced through various streets of the city until about a quarter before

[9] Quoted from Hale, "Pleas of the Crown" and Hawkins, ditto, as cited by Beale in his "Cases on Criminal Law," 3d ed.

[10] Part of the case is omitted.

two o'clock on that day, when he was seen going towards and about to enter the medical college. That he did not return to his home. That on the next day a very active, particular, and extended search was commenced in Boston and the neighboring towns and cities, and continued until the 30th of November; and that large rewards were offered for information about Dr. Parkman. That on the 30th of November, certain parts of a human body were discovered in and about the defendant's laboratory in the medical college; and a great number of fragments of human bones and certain blocks of mineral teeth imbedded in slag and cinders, together with small quantities of gold, which had been melted, were found in an assay furnace of the laboratory. That in consequence of some of these discoveries the defendant was arrested on the evening of the 30th of November. That the parts of a body so found resembled in every respect the corresponding portions of the body of Dr. Parkman, and that among them all there were no duplicate parts; and that they were not the remains of a body which had been dissected. That the artificial teeth found in the furnace were made for Dr. Parkman by a dentist in Boston in 1846, and refitted to his mouth by the same dentist, a fortnight before his disappearance. That the defendant was indebted to Dr. Parkman on certain notes, and was pressed by him for payment; that the defendant had said that on the 23d of November, about nine o'clock in the morning, he left word at Dr. Parkman's house that, if he would come to the

medical college at half-past one o'clock on that day, he would pay him; and that, as he said, he accordingly had an interview with Dr. Parkman at half-past one o'clock on that day, at his laboratory in the medical college. That the defendant then had no means of paying, and that the notes were afterwards found in his possession.

The opinion of the court on the law of the case was given in the charge to the jury as follows:

Shaw, C. J. Homicide, of which murder is the highest and most criminal species, is of various degrees, according to circumstances. The term, in the largest sense, is generic, embracing every mode by which the life of one man is taken by the act of another. Homicide may be lawful or unlawful; it is lawful when done in lawful war upon an enemy in battle; it is lawful when done by an officer in the execution of justice upon a criminal, pursuant to a proper warrant. It may also be justifiable, and of course lawful, in necessary self-defence. But it is not necessary to dwell on these distinctions; it will be sufficient to ask attention to the two species of criminal homicide, familiarly known as murder and manslaughter.

In seeking for the sources of our law upon this subject, it is proper to say, that whilst the statute law of the commonwealth declares (Rev. Sts. c. 125, Sec. 1) that "Every person who shall commit the crime of murder shall suffer the punishment of death for the same," yet it nowhere defines the crimes of murder or manslaughter, with all their minute and carefully-

considered distinctions and qualifications. For these, we resort to that great repository of rules, principles, and forms, the common law. This we commonly designate as the common law of England; but it might now be properly called the common law of Massachusetts. It was adopted when our ancestors first settled here, by general consent. It was adopted and confirmed by an early act of the provincial government, and was formally confirmed by the provision of the constitution (c. 6, art. 6) declaring that all the laws which had theretofore been adopted, used, and approved, in the province or state of Massachusetts bay, and usually practiced on in the courts of law, should still remain and be in full force until altered or repealed by the legislature. So far, therefore, as the rules and principles of the common law are applicable to the administration of criminal law, and have not been altered and modified by acts of the colonial or provincial government, or by the state legislature, they have the same force and effect as laws formally enacted.

By the existing law, as adopted and practiced on, unlawful homicide is distinguished into murder and manslaughter.

Murder, in the sense in which it is now understood, is the killing of any person in the peace of the commonwealth, with *malice aforethought,* either express or implied by law. Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or

more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of a heat regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.

Manslaughter is the unlawful killing of another without malice; and may be either voluntary, as when the act is committed with a real design and purpose to kill, but through the violence of sudden passion, occasioned by some great provocation which, in tenderness for the frailty of human nature, the law considers sufficient to palliate the criminality of the offence; or involuntary, as when the death of another is caused by some unlawful act, not accompanied by any intention to take life.

From these two definitions it will be at once perceived that the characteristic distinction between murder and manslaughter is malice, express or implied. It therefore becomes necessary in every case of homicide proved, and in order to an intelligent inquiry into the legal character of the act, to ascertain with some precision the nature of legal malice, and what evidence is requisite to establish its existence.

Upon this subject the rule, as deduced from the authorities, is that the implication of malice arises in every case of intentional homicide; and, the fact of killing being first proved, all the circumstances of acci-

dent, necessity, or infirmity, are to be satisfactorily established by the party charged, unless they arise out of the evidence produced against him to prove the homicide and the circumstances attending it. If there are, in fact, circumstances of justification, excuse, or palliation, such proof will naturally indicate them. But where the fact of killing is proved by satisfactory evidence, and there are no circumstances disclosed tending to show justification or excuse, there is nothing to rebut the natural presumption of malice. This rule is founded on the plain and obvious principle that a person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and that he must intend all the natural, probable, and usual consequences of his own acts. Therefore, when one person assails another violently with a dangerous weapon likely to kill, and which does in fact destroy the life of the party assailed, the natural presumption is that he intended death or other great bodily harm; and, as there can be no presumption of any proper motive or legal excuse for such a cruel act, the consequence follows that, in the absence of all proof to the contrary, there is nothing to rebut the presumption of malice. On the other hand, if death, though wilfully intended, was inflicted immediately after provocation given by the deceased, supposing that such provocation consisted of a blow or an assault, or other provocation on his part, which the law deems adequate to excite sudden and angry passion and create heat of blood, this fact rebuts the presumption of malice; but

still, the homicide being unlawful, because a man is bound to curb his passions, is criminal, and is manslaughter.

In considering what is regarded as such adequate provocation, it is a settled rule of law that no provocation by words only, however opprobrious, will mitigate an intentional homicide so as to reduce it to manslaughter. Therefore, if, upon provoking language given, the party immediately revenges himself by the use of a dangerous and deadly weapon likely to cause death, such as a pistol discharged at the person, a heavy bludgeon, an axe, or a knife, if death ensues, it is a homicide not mitigated to manslaughter by the circumstances, and so is homicide by malice aforethought within the true definition of murder. It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed; it is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words "malice aforethought," in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance.

In speaking of the use of a dangerous weapon, and the mode of using it upon the person of another, I have spoken of it as indicating an intention to kill him, or to do him great bodily harm. The reason is this;

Where a man, without justification or excuse, causes the death of another by the intentional use of a dangerous weapon likely to destroy life, he is responsible for the consequences, upon the principle already stated, that he is liable for the natural and probable consequences of his act. Suppose, therefore, for the purpose of revenge, one fires a pistol at another, regardless of consequences, intending to kill, maim, or grievously wound him, as the case may be, without any definite intention to take his life; yet, if that is the result, the law attributes the same consequences to homicide so committed, as if done under an actual and declared purpose to take the life of the party assailed. . . .

The true nature of manslaughter is that it is homicide mitigated out of tenderness to the frailty of human nature. Every man, when assailed with violence or great rudeness, is inspired with a sudden impulse of anger, which puts him upon resistance before time for cool reflection; and if, during that period, he attacks his assailant with a weapon likely to endanger life, and death ensues, it is regarded as done through heat of blood, or violence of anger, and not through malice, or that cold-blooded desire of revenge which more properly constitutes the feeling, emotion, or passion of malice.

The same rule applies to homicide in mutual combat, which is attributed to sudden and violent anger occasioned by the combat, and not to malice. When two meet, not intending to quarrel, and angry words suddenly arise, and a conflict springs up in which blows

are given on both sides, without much regard to who is the assailant, it is a mutual combat. And if no unfair advantage is taken in the outset, and the occasion is not sought for the purpose of gratifying malice, and one seizes a weapon and strikes a deadly blow, it is regarded as homicide in heat of blood; and though not excusable, because a man is bound to control his angry passions, yet it is not the higher offence of murder.

Comment. With the question whether Webster committed this crime we have no concern. That was a question for the jury which decided, on the evidence, that he had. Chief Justice Shaw has most clearly and exhaustively laid down the distinctions in homicide. The points for our notice are:

1. Malice is necessary to murder.
2. In manslaughter, the punishment seems to be an attempt at the *lex talionis* — "to make the punishment fit the crime." There being no malice of the kind above referred to, there can be no murder. The punishment for manslaughter is, however, very severe.
3. Everyone is presumed to intend to do that which he actually does.
4. Insults never justify murder or manslaughter before the law. We shall see that juries often override the law.

THE BECKER CASE

(Taken from Court Records, the daily press and current magazines.)

One Herman Rosenthal was shot to death at about two A.M., July 16th, 1912, in one of the most public portions of New York. He was a gambler and law

breaker but his murder aroused great public interest and excitement, *first,* because of the barbarous defiance of law displayed in the manner of his killing, and, *second,* because he was about to appear before a grand jury and give evidence to establish improper relationship between members of the police force in said city and unlawful resorts, and wherefrom arose the possibility for suspicion that the police had participated in or encouraged the murder.

On August 20th, 1912, Charles Becker, a police lieutenant, and four professional law-breakers, commonly known as gunmen, to wit, Whitey Louis, Dago Frank, Lefty Louie and Gyp the Blood, as they were commonly designated, as well as Jack Sullivan and William Shapiro were jointly charged with murder in the first degree, as having killed Rosenthal. All but the last two named were subsequently convicted and executed; but not until Becker had been twice tried. The first appeal for a new trial was granted, the second refused. The others made an appeal which was refused.

There is nothing peculiar or noteworthy about the case of the four gunmen who committed the murder in the presence of a number of witnesses, though they escaped in an automobile and fought conviction when caught, denying their guilt. The interest of the case and its importance lies in the following circumstances.

There was no suggestion that Becker directly participated in the shooting. It was claimed that he hired Rose, Webber and Vallon, gamblers, who in turn hired the "gunmen" to put Rosenthal out of the way in

order that he, Rosenthal, might not betray Becker. Rose, Webber and Vallon were promised immunity from prosecution for murder if they would testify against Becker, which they did. They were undoubtedly guilty of hiring the men who actually killed Rosenthal. In granting a new trial Justice Hitchcock criticized severely the method of Justice Goff in the original trial and declared that Becker had not had a fair trial within the meaning of the law, and that not in mere matters of technicality but in essentials.

The character of the witnesses against Becker and the fact that they were to save their own lives by testifying against him aroused fierce criticism. In the second trial other witnesses were produced who corroborated the accomplices. Chief Justice Bartlett in his opinion (second appeal) said "the public prosecutor appears to have considered that the community would gain more by the conviction of a faithless public officer than it would suffer by the escape of three confessed murderers from any punishment for their participation in the crime. This was a matter for him to determine under the responsibility of his official oath."

Becker went to the electric chair protesting his innocence. His friends have claimed that time would vindicate him and show him to have been the victim of a conspiracy.

The gunmen killed Rosenthal simply as a matter of business for which they were paid.

The case is important for many reasons, — chiefly

because the public was so outraged at the thought that its trusted officers for the prevention of crime were themselves guilty of the worst of crimes. There was little criticism of the immunity granted to the three accomplice witnesses because it was believed the price was not too high to pay.

While many have questioned the guilt of Becker in directly causing the death of Rosenthal, there is a general feeling that he was morally if not legally guilty, in that he could have prevented the crime had he chosen to do so. He was shown to have grown rich (relatively) in a very short time upon a very small salary, immediately following raids upon gambling houses. But many believe that the murder of Jack Zelig, after Rosenthal's, put out of the way one who would have been able to testify about the man "higher up."

(This case is equally a case under Security and Liberty.)

Comment. The characteristics of murder, in the case of Becker, were all present. The act was premeditated, malicious, effectual. The fact that the deed was actually committed by another makes no difference whatever, since the law has for a long time recognized the principle, *qui facit per alium facit per se.*

Rose, Webber and Vallon were doubtless as guilty as Becker in every respect save one, that theirs was not the initial malice which sought to abolish Rosenthal. The natural (social) law of New York State that he who commits murder as defined by civilization and is caught, will be killed, was nullified by another law which

may here be tentatively assumed, that society will do *anything* which ministers to its own preservation. Society is in less danger from the release of three convicted murderers, released consciously and under observation, than from one of its now trusted servants who has betrayed his trust. Any price will be paid to guarantee the trustworthiness of our police system.

The four gunmen were actual murderers, dangerous and to be abolished — but abolished more because the letter of the law is so specific than because society has definitely come to a conclusion about them. Perhaps one might make the surmise that they are rather open enemies of our own group than traitors within it; as they show no social conscience at all.

PLEW–WAKEFIELD CASE

(Sources: Court Records and Daily Papers.)

William Wakefield was murdered by James Plew in June, 1912, near Bristol, Conn. His body was found two weeks later and Plew confessed, implicating Mrs. Wakefield, as they wished to marry when they could get Wakefield out of the way. Plew's case was plain and he was summarily convicted and hanged.

Mrs. Wakefield was found guilty Nov. 4, 1913, of murder in the first degree and sentenced to be hanged. The Connecticut statute made this possible. Under the common law she would have been simply an accessory before the fact and could not have been tried as a principal.

At the time of Mrs. Wakefield's trial Plew had not yet been convicted of the crime although he had

pleaded guilty. It was necessary then for the state to prove both his and Mrs. Wakefield's guilt in order to convict her. She had also to be convicted of having "procured, counseled and encouraged" him to do it. Silent acquiescence would not be sufficient. She was found guilty as stated, but, on appeal, a new trial was granted on error. Meanwhile a great hubbub arose among those opposed to capital punishment and among women's organizations to keep a woman from being hanged.

On July 30th she was found guilty of murder in the second degree and sentenced to prison for life.

There can be little doubt that the second verdict was influenced by popular clamor — a sentimental objection to having a woman hanged being a prominent feature of the protests.

There was quite as much evidence of her instigation of the crime as was found in the Becker Case. She had frequently made remarks which encouraged Plew to believe that she wished to have her husband killed. She was not even remotely suspected of having taken part, directly, in the killing.

Comment. There can be no doubt that Mrs. Wakefield was guilty in exactly the same way as Becker. She would doubtless have been hanged but for the fact that she was a woman. There are not many women murderers and the State has not felt them as a menace.

OURISH CASE

CONNECTICUT, 1786. — ANONYMOUS

Hannah Ourish, 13 years old, killed a playmate, Eunice Bolles, 7 years, by pounding her on the head with a stone. She was given the death penalty and hanged.

Hannah was the daughter of a colored man and a Pequot squaw. Her mother was addicted to drink and her home situation was of the poorest. Under these circumstances she became addicted to lying, and she was often cruel.

Her parents, to get rid of her, bound her out to a widow. After Hannah and Eunice went berry picking one day, Eunice complained that Hannah had stolen some of her berries. Hannah was punished, and after that took every opportunity to torment Eunice.

It appears that in the trial little weight was given to the age of the defendant and the peculiar conditions which had surrounded her life.

Comment. Given as an indication of the attitude of a former day. No child so young could be hanged under law in the United States today: on the ground, declared in statutes, that at such an age full recognition of the consequences of one's acts is not possible. The surface evidence here, in addition, points to the abnormality of the girl.

REGINA *v.* HOLLAND

Liverpool Assizes, 1841

(Reported 2 Moody & Robinson, 351. Beale 3d ed.)

" The deceased had been waylaid and assaulted by the prisoner and, among other wounds, he was severely cut across one of his fingers by an iron instrument. On being brought to the infirmary, the surgeon urged him to submit to the amputation of the finger, telling him, unless it were amputated, he considered that his life would be in great hazard. The deceased refused to allow the finger to be amputated. It was thereupon dressed by the surgeon, and the deceased attended at the infirmary from day to day to have his wounds dressed; at the end of a fortnight, however, lock-jaw came on, induced by the wound on the finger; the finger was then amputated but too late, and the lock-jaw ultimately caused death. The surgeon deposed that if the finger had been amputated in the first instance, he thought it most probable that the life of the deceased would have been preserved.

" For the prisoner, it was contended that the cause of death was not the wound inflicted by the prisoner, but the obstinate refusal of the deceased to submit to proper surgical treatment, by which the fatal result would, according to the evidence, have been prevented. *Maule, J.*, however, was clearly of opinion that this was no defense, and told the jury that if the prisoner wilfully, and without any justifiable cause, inflicted

the wound on the party, which wound was ultimately the cause of death, the prisoner was guilty of murder; that for this purpose it made no difference whether the wound was in its own nature instantly mortal, or whether it became the cause of death by reason of the deceased not having adopted the best mode of treatment; the real question is whether in the end the wound inflicted by the prisoner was the cause of death." (Guilty)

Comment. There are no degrees of murder in England. It is probable that the death penalty was not inflicted; but doubtless the prisoner received a much more severe punishment than he would have received in the United States under the same conditions.

REX *v.* SMITH

Old Bailey — 1804

(Reported 1 Russ. Cr. & M. 458. Beale 2d ed.)

"The neighborhood of Hammersmith had been alarmed by what was supposed to be a ghost; the prisoner went out with a loaded gun to take the ghost; and, upon meeting with a person dressed in white, immediately shot him.

"*M'Donald, C. B.,* Rooke and Lawrence, JJ., were clear that this was murder, as the person who appeared as a ghost was only guilty of a misdemeanor; and no one might kill him though he might not otherwise be taken.

"The jury however brought in a verdict of manslaughter; but the court said they could not receive that verdict, and told the jury that if they believed the evidence, they must find the prisoner guilty of murder, and if they did not believe the evidence they should acquit the prisoner.

"The jury then found the prisoner guilty, and sentence was pronounced, but the prisoner was afterwards reprieved."

Comment. The prisoner was deliberately taking the law into his own hands. He was possibly terrified, possibly headstrong. The case is admirably reported in Beale and leaves no room for comment, except the observation that the forms of law were preserved by the judge in refusing to allow a verdict contrary to the evidence.

67 Alabama 157. Nov. 1897

A husband beat his wife while she was quick with child, inflicting injuries from which it died shortly after birth. The court held that, if a woman be quick with child and be beaten by one intentionally and knowing her to be so, and the child, after being born alive, die because of such beating, then the offense was murder in the second degree. The jury found the defendant guilty of murder in the second degree.

There was no evidence of express malice or of an intent to take life, but malice was implied because the husband beat his wife unlawfully and in a manner dangerous to life. Implied malice is the distinguishing characteristic of murder in the second degree.

Comment. Note that if the child had died before birth, the defendant could have been convicted of neither murder nor manslaughter.

ALABAMA *v.* PIXLEY

(Student report)

Barr Pixley lived in a cabin. Contemplating a trip away, he fixed a gun near the door so that any one entering the door in the absence of the owner would receive the charge full in the body. He also removed his valuable possessions to a nearby house, and left the door insecurely locked.

While Pixley was away, Nels Anderson, in company with two other men sought shelter in the cabin. Anderson, being the first to enter was killed by the discharge of the spring-gun.

The court in finding Pixley guilty of murder in the second degree said: A vindictive desire to take human life was evidenced by these facts:

The valuable property was removed.

The door was insecurely locked.

The spring-gun was so arranged that the charge of the gun would kill anyone entering the door.

Pixley was sentenced to life imprisonment.

Comment. The only palliation of his offense was that he had not sought out any particular person to kill. The killing of any person by an act felonious in itself but not aimed at any particular person, will not be punished with death.

New York Times (?) *Nov.* 12, 1914

Thomas B. lived with Hudson W., his step-father, and his mother at Bortins Landing, N. J. The step-father abused B.'s mother, who was blind, striking her in the face. B. saw W. strike and wound his mother. Crazed with anger he got a shot gun but could find no cartridges. He went to a neighbor's house and borrowed some cartridges saying " I'm going to kill a dog that has just bitten my poor old blind mother."

He then ran back, stepped in the doorway and discharged both barrels at his step-father, killing him almost instantly. He was found binding up his mother's wounds when the police arrived and arrested him.

He was sentenced to serve not less than 15 nor more than 30 years at hard labor.

Comment. There can be no doubt that the severity of this sentence is due to the element of deliberation in the act. B. intended to kill.

Cf. the case of Robert W. 17 years of age who on November 15th of the same year, killed his father at Bristol, Tenn. The elder W. had whipped two of his children and had threatened Mrs. W. with a revolver. The boy was exonerated.

Here there had been a threat to kill,— also the case occurred in Tennessee. (Source: Student report from daily papers.)

Cf. also the case of Arthur B. who confessed to the murder of his mother and sister, after having first declared that they had been killed and that he was hunt-

ing for the murderers. The crime occurred at Maidstone, Vermont, March 9th, 1911.

There was a farm willed to B. by his father, which he declared had been taken away from him by his family. Judge Butler said the most charitable view he could take of the affair was that the defendant's mind had dwelt upon the loss of property that his father had willed to him and had been excited and controlled by passion. This condition was further aggravated by the use of intoxicating liquor furnished by his own brother. He was declared guilty of murder in the first degree and sentenced to life imprisonment at hard labor in Windsor jail, November 15th, 1911. (Daily paper November 15, 1911.)

NEW MEX. CODE, 1915, SEC. 1645

Provides that tampering with a locomotive in such a manner as to threaten life or cause its loss shall be treated either as an assault with intent to commit murder or else as murder.

Manslaughter

(*Daily Papers, Media, Ills. Nov. 2, 1914.— Student report.*)

St. Lewis Pinkerton, a tax collector, was found murdered after an absence of several weeks, upon the confession of George R. Marsh, who with Roland S. Pennington was suspected of the crime. Marsh led the officers to the woods where the body was hidden. He had found evidence of improper relations between

Pinkerton and Marsh's wife. He told his suspicions to Pennington. The three men met in a barn where Pinkerton was killed by a black jack wielded by Marsh, Pennington holding him. About $300 in money which Pinkerton had in his pockets was taken by Pennington, Marsh refusing any of the money, but making no objections to Pennington's taking it.

In view of the fact that Marsh believed that there were improper relations between Pinkerton and the former's wife, the jury held that the crime was committed in the heat of passion by him. Their verdict gave him fifteen years for second degree manslaughter.

(Pennington, however, having suggested the crime and taken the money was convicted of murder in the first degree. Life imprisonment.)

Comment. An interesting case of discrimination. Marsh actually committed murder. There was evident premeditation and such malice as Justice Shaw construed in the Webster Case; but the "unwritten law" that a man has some right to avenge the betrayer of his honor, influenced the jury.

Pennington was of the character of the gunmen in the Becker Case. In him it was simply sordid murder with no individual malice apparent.

Brooklyn Daily Eagle, December 12, 1913.

Charles Christman, 19 years old, of 534 Cleveland Street, was this afternoon convicted of manslaughter in the first degree by a jury in the County Court, before Judge Dike. Christman was charged with having

prompted Daniel Sullivan, a gun man, to shoot and kill Thomas Ryan, of 1432 Boyd Avenue, on August 16th, last.

The murder resulted over a quarrel between Ryan and Richard Surdez, a chauffeur. Ryan won the affections of Surdez's sweetheart, Fannie Albers, of 390 Crescent St., and the jilted suitor hired Christman to "do up" Ryan. Christman got Sullivan to do the shooting. Sullivan last week pleaded guilty to manslaughter in the second degree. Christman will be sentenced on Monday. The jury was out about two hours.

Comment. I find no mention of Surdez's part in the killing. It is important to compare this with the Becker Case. Christman would correspond to Rose, Webber and Vallon in the role he played; Sullivan to the gunmen. The killings occurred within about a year of one another, in the same municipality. The great difference in the cases is their importance to the safety of the group. The Christman case was the result of a private quarrel, vicious enough but not threatening the security of the city.

COMMONWEALTH *v.* MINK

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1877.

(123 Mass. 422. Beale 3d ed.)

Charles Ricker of Lowell was engaged to the defendant Mink. There was an interview in her room in which he declared his intention to break off the

engagement. She declares that she thereupon went to her trunk, took a pistol from it and attempted to kill herself. Ricker struggled with her to prevent this and in the course of the struggle was shot and killed. The defendant was tried and, supposing her story to be true, the jury did not find her guilty of murder but of manslaughter on the ground, that, while she had not intended the death of Ricker, his death was brought about by her while she was trying to commit a felony, namely, suicide. "By the common law of England suicide was considered a crime against the laws of God and man, the lands and chattels of the criminal were forfeited to the King, his body had an ignominious burial in the highway, and he was deemed a murderer of himself and a felon, *felo de se.*"

But suicide in itself is not now a felony, in Massachusetts, and, in any case, the offender is outside the province and reach of the law. An attempt to commit suicide is a misdemeanor. It is a *malum in se* not merely *malum prohibitum.* And "it isn't disputed that any person who, in doing or attempting to do an act which is unlawful and criminal, kills another, though not intending his death, is guilty of criminal homicide, and, at least of manslaughter."

Guilty of manslaughter.

Comment. It should be noted that the difference between *mala prohibita* and *mala in se* is one which has been held by some to be either purely fictitious or at most one of degree, and that a point has been strained here to make the offense the same as a felony. The milder attitude of

the public toward suicides is not here reflected. The ancient letter of the law has convicted this woman of an offense which, according to the evidence, she never intended.

REGINA *v.* SALMON

(14 Cox C. C., 494. Beale, 3d ed.)

Three men were tried for the manslaughter of William Wells, ten years old. The prisoners went into a field and each fired a shot from a rifle at a target. One of the shots killed the boy who was at the time in a tree in his father's garden, distant about four hundred yards from the spot where the shot was fired. The rifle was sighted for nine hundred and fifty yards, and would probably be deadly at a mile. It did not appear which one of the prisoners fired the fatal shot.

The person who fired the fatal shot was clearly guilty of manslaughter since if a person does a thing which is dangerous without taking proper precautions against danger arising and in the course of his act kills anyone, it is a criminal act. These prisoners were commonly engaged and were commonly guilty of culpable negligence under the circumstances; hence were guilty of manslaughter. *Conviction affirmed.*

Comment. Notice that there are no degrees of manslaughter in England.

These men had in no way intended the death of the child.

Wilful Neglect

THE TRIANGLE WAIST COMPANY CASE

In April, 1912, a destructive fire broke out in the Asch Building, New York City, occupied by the Triangle Waist Company, employing large numbers of girls and women in crowded quarters, filled with inflammable materials. Stairways were narrow and insufficient, some of them inaccessible because doors were found locked, and the single fire escape ended in a *cul-de-sac*. One hundred and forty-seven people were killed, mostly girls and women, being either burned to death or killed when they jumped to avoid the flames. The fire swept instantaneously over large quantities of inflammable materials.

Harris and Blanck of the Triangle Waist Company were indicted for manslaughter; the case of two girls especially, who were killed because they could not get through a door supposed to have been locked, being made the basis of the indictment. Judge Crain said "Because they are charged with a felony, I charge you that before you find these defendants guilty of manslaughter in the first degree you must find that this door was locked. If it was locked and locked with the knowledge of the defendants, you must also find beyond a reasonable doubt that such locking caused the death of Margaret Schwartz. If these men were charged with a misdemeanor, I might charge you that they need have no knowledge that the door was locked,

but I think that in this case, it is proper for me to charge that they must have had personal knowledge of the fact that it was locked." Testimony was conflicting and it was manifestly impossible to prove their guilty knowledge. Consequently, they were acquitted. No one probably has the slightest doubt that the defendants Harris and Blanck were perfectly cognizant of the conditions of work in their factory. Two years and a half after the Triangle fire they were fined for having an exit door locked in another of their factories.

An unusually intelligent coroner's jury had found Harris and Blanck responsible because of culpable and criminal negligence. This is one of the rare cases in which deaths not due directly to malice and not brought about by the direct agency of any one, result in so much as an indictment for manslaughter.

Sources: Court records, daily papers and current magazines.

Comment. Judge Crain's remark that since defendants were charged with a felony and not a misdemeanor it would be necessary for the prosecution to prove "guilty knowledge" is an indication of the demand of the public conscience that, in more serious matters, intent be proven. It is not sufficient that it should be evidently present; it must be demonstrably present. The certainty required is for the security of the group. If the intent is established, the offense is inevitably more serious.

COMMONWEALTH *v.* CAMPBELL

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1863.

(Reported 7 All. 541. Beale, p. 350, 2d ed.)

A riot occurred near the armory in Cooper Street in Boston which grew out of the enforcement of a draft of men for the army. The evidence offered by the government tended to show that the prisoner was there participating in the riot, with a large number of other persons. A military force was called out to suppress the riot and was stationed in the armory. The mob fired on the soldiers and the soldiers on the mob. During this firing one William Currier was killed and one Campbell was indicted for his murder, but he was acquitted.

Bigelow, C. J., said that it was clear that the general rule of law was that a person engaged in the commission of an unlawful act was legally responsible for all the consequences which naturally or necessarily flow from it. Yet no person can be held guilty of homicide unless the act is either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by some one acting in concert with him or in furtherance of a common object or purpose. Certainly that cannot be said to be an act of a party in any just sense, or on any sound legal principle which is not only not done by him . . . but is committed by a person who is his direct and immediate adversary, and who is, at the moment when the

alleged criminal act is done, actually engaged in opposing and resisting him and his confederates and abettors. . . . The jury will accordingly be instructed that, unless they are satisfied beyond a reasonable doubt that the deceased was killed by means of a gun or other deadly weapon in the hands of the prisoner, or of one of the rioters with whom he was associated and acting, he is entitled to an acquittal. (Opinion greatly condensed but given in the Justice's own words.)

"The case of the Philadelphia rioters, cited by the attorney-general . . . is obscurely reported. If it can be supported at all as a true exposition of the law, it can only be upon the ground that both parties or sides had a common object in view, namely, a breach of the peace, and that both went by agreement or mutual understanding to engage in an affray or riot. If such was the fact, then, as in the case of a duel, although to accomplish the common purpose they took opposite sides, — still they might all well have been deemed to have confederated together in an unlawful enterprise, and thus to have become responsible, on the principle already stated, for a criminal act done in pursuance of the common design by any one of their confederates, with whichever side he may have acted in the affray."

Comment. It was rather absurd to charge Campbell with murder in any case; for he could hardly have been convicted of murder had it been certain that he fired the shot, since he plainly was not trying to kill a particular person. In the Salmon Case where all three men were

convicted of manslaughter though it remained unknown which of them had accidentally but culpably killed the boy, they were all engaged in an act whose consequences they could have foreseen; and it was definitely known that one of them had done the killing.

Cf. Becker Case.

SPIES *v.* PEOPLE

Supreme Court of Illinois, 1887

(Reported 122 Ill., 1. Beale, p. 432, 3d ed.)

On August 20th, 1886, in Chicago, Ill., a jury returned a verdict of murder against August Spies, Michael Schwab, Samuel Fielder, Albert R. Parsons, Adolph Fischer, George Engel and Louis Lingg and fixed death as the penalty. Oscar Neebe was found guilty of murder and the penalty was fixed at fifteen years in the penitentiary. The case was appealed. A part of the opinion of *Magruder, J.,* follows:

" About the first day of May, 1886, the workingmen of Chicago and of other industrial centres in the United States were greatly excited upon the subject of inducing their employers to reduce the time during which they should be required to labor on each day to eight hours. In the midst of the excitement growing out of this eight hour movement, as it was called, a meeting was held on the evening of May 4th, 1886, at the Haymarket . . . in the West division of the City of Chicago. This meeting was addressed by the

defendants, Spies, Parsons and Fielder. While the latter was making the closing speech, and at some point of time between ten and half past ten in the evening, several companies of policemen, numbering one hundred and eighty men, marched into the crowd from their station on Desplaines Street, and ordered the meeting to disperse. As soon as the order was given, some one threw among the policemen a dynamite bomb which struck Degan, who was one of the police officers, and killed him. As the result of the throwing of the bomb and of the firing of pistol shots, which immediately succeeded the throwing of the bomb, six policemen, besides Degan, were killed, and sixty more were seriously wounded.

"It is undisputed that the bomb was thrown and that it caused the death of Degan. It is conceded that no one of the convicted defendants threw the bomb with his own hands."

The Illinois statute abolishes the distinction between accessories before the fact and principals. The defendants had formed a common purpose to accomplish murder by concerted action. "Where there is a conspiracy to accomplish an unlawful purpose, and the means are not specifically agreed upon, or understood, each conspirator becomes responsbile for the means used by any co-conspirator in the accomplishment of the purpose in which they are all at the time engaged." *State* v. *McCahill*, 72 Iowa, 111. The jury found that the facts constituting a conspiracy were established. The court of appeals sustained the

verdict of the lower court and the men were duly executed. The final words of Judge Magruder's opinion are as follows:

"If the defendants, as a means of bringing about the social revolution and as a part of the larger conspiracy to effect such a revolution, also conspired to excite classes of workingmen in Chicago into sedition, tumult and riot and to the use of deadly weapons and the taking of human life, and for the purpose of producing such tumult, riot, and to the use of weapons, and taking of life, advised and encouraged such classes by newspaper articles and speeches to murder the authorities of the city, and a murder of a policeman resulted from such advice and encouragement, then defendants are responsible therefor."

Comment. A case of responsibility for any movement to whose ends one consents. There would have been no doubt of the guilt of the defendants except that the issue was clouded by a confusion with the right of free speech. For the extent to which that right actually exists compare cases under that heading. The concluding words of Judge Magruder give the formal opinion of the court on that subject. This is yet another case where those who incite to murder are counted to be as guilty as if they had done the deed themselves. With reference to the philosophy of anarchy the case is significant. No social philosophy is, at this point, deemed to be justified in overthrowing the society that exists; at least, it cannot be justified by the sworn officers of that existing society.

II. SOMETIMES REPROBATED, OFTEN NOT

Accidental

THE *GENERAL SLOCUM* CASE

UNITED STATES *v.* VAN SCHAICK

(134 Federal Reporter 592, 159 Federal Reporter 847, also daily papers and magazines.)

The Steamship *General Slocum,* Captain Van Schaick, Master, was inspected May 5th, 1904, and given a license in her usual waters near New York to navigate for one year.

On June 15th of the same year, while navigating the East River with a church excursion of between 1000 and 1100 persons, largely women and children, she took fire and, the fire rapidly spreading and being quite uncontrolled by the crew, about 1000 persons lost their lives, though none of the crew was lost.

Subsequently, the owner of the vessel, the Knickerbocker Steamship Company, the master of the vessel, and the directors of the company were all indicted for manslaughter and the inspector who had examined the vessel on May 5th, the charges being that the vessel was unfit for service on account of rotten life preservers, filled with cork dust and useless, lack of discipline on the vessel and inadequate fire prevention apparatus. All of these charges were abundantly sustained in detail.

Sec. 5344, Title 70, Revised Statutes of the United States, reads, "Every captain, engineer, pilot or other person employed on any steamboat or vessel, by whose misconduct, negligence or inattention to his duties on such vessel, the life of any person is destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof before any Circuit Court of the United States, shall be sentenced to confinement at hard labor for a period of not more than 10 years."

It was shown that there had been no fire drill, that Van Schaick was aware of the inflammable contents of the forward hold in which the fire started, that he knew the need of many things to make his vessel safe. Judge Thomas, at the first trial, said that it was no part of a master's duty to make an inspection of life preservers and other safety apparatus, once made by supposedly competent authorities, but that it was his duty to use ordinary observation and not to leave port with his vessel in an unsafe condition.

The directors were not named in the statutes but by common law would be principals in the second degree.

On January 27th, 1906, Captain Van Schaick was found guilty of manslaughter and sentenced to ten years imprisonment at hard labor. An appeal was taken but conviction was affirmed and the captain was again sentenced February 12th, 1908. He was paroled from Sing Sing in August, 1911, after serving a few months more than three years of his sentence and

was pardoned outright by President Taft on Christmas Day, 1912, he being then over 72 years of age.

Lundberg, the inspector, was tried twice, the jury disagreeing in both cases. I can find no record of a third trial.

There was ample evidence to show that the owners and directors were aware that new life preservers had not been furnished in from 9 to 13 years, and that the fire prevention equipment was of a poor quality and not kept in working order. Captain Van Schaick when about to leave for prison was interviewed regarding his knowledge of poor and inadequate equipment. — "It is all very well," he said, "to talk of proper equipment, but to put a vessel in first class shape costs a lot of money and the chances are that if I had ordered all the things the *Slocum* required I would have been out of a job."

The directors were also condemned but I can find no record in newspapers or court reports of the penalty imposed. Apparently they never suffered any punishment from the State.

REGINA *v.* BRADSHAW

Leicester Assize 1878

(Reported 14 Cox, C. C. 83. Beale, 3d ed. p. 212.)

William Bradshaw killed Herbert Dockerty in a football game at a match held at Ashby-de-la-Zouch. The killing occurred in the course of the game, by

the prisoner's "charging" Dockerty in a manner described variously as within the rules of the game and not within such rules.

Bramwell, L. J. "The question for you (the jury) to decide is whether the death of the deceased was caused by the unlawful act of the prisoner. There is no doubt that the prisoner's act caused the death, and the question is whether that act was unlawful. No rules or practice of any game whatever can make that lawful which is unlawful by the law of the land. . . . Independent of the rules, if the prisoner intended to cause serious hurt to the deceased, or if he knew that, in charging as he did he might produce serious injury, and was indifferent and reckless as to whether he would produce serious injury or not, then the act would be unlawful." *Verdict, not guilty.*

Comment. There can be no doubt that, had the jury accepted the judge's charge at its face value, they would have found the prisoner guilty of manslaughter; as every one knows that "charging" or "rushing" under certain conditions may very well result in death.

But popular opinion would never uphold such a verdict inasmuch as the element of malice or enmity toward an individual is — in all probability — totally lacking; and those who play football accept all such risks. Unnecessary roughness in playing does frequently bring about the disqualification of players and breaks up agreements between friendly rivals; but no football players could be found to believe that there was a real criminal element involved.

RAILROAD ACCIDENTS

Outlook, 100 : 247, Feb. 3, 1912.

(Last week) several high railroad officials were killed in a preventable accident. There was a wooden car on the rear of a steel train. — Rear end collision, many prominent men killed. Five years ago Samuel Spencer, President of the Southern Railway, was killed in the same manner.

Block signals are sometimes overrun by engineers. The only safety is in the automatic stop system now in successful operation on the New York Subway system, which, however, cannot be used on surface roads on account of snow and ice, etc.

Scientific American, 107 : 342, Oct. 26, 1912.

The Westport wreck was preventable; cross-overs could be lengthened and " stiffening discipline " is not enough. We look in vain for evidence that the New Haven has made any effort to improve physical conditions. With the example of the Pennsylvania and New York Central, the public asks — WHY? The Bridgeport wreck preceded Westport by fourteen months — in that time nothing was done to change conditions. (See illustration in same number of *Sci. Amer.*)

The same article states that while cross-overs are much easier and of far greater radius on the Pennsylvania, still on the shorter cross-overs where there is a speed limit, constant tests are made of the actual

speed at which engineers cross, without their knowledge. If they exceed the limit they are punished.

Railroad Accidents Due to Poor Quality of Rails.

Nation, 94 : 279, Mar. 21, 1912.

Rail makers contend that present day traffic is too heavy for a rail which used to serve all ordinary purposes. Some railway men allege that the quality of rails turned out today is deteriorating, but in the recent wreck on the N. Y. Central (week before) it was a 112-lb. rail, the heaviest now laid down that was broken.

The Vice-President of the Great Northern Railway made a statement that the 68-lb. rails laid down twelve or thirteen years before were giving better service than the 90-lb. rails laid down within three years. And the Railway Age Gazette sharply criticizes the Steel Corporation for making poor rails. They could not be brought up to specification because of monopoly conditions.

Opposition to Safety Through Automatic Devices on Railroads from Operators in the Interest of Their Caste.

Am. Rev. of Rev., 47 : 334.

The questions are brought up. (1) Are such devices in the interest of good railroading and will they not tend to weaken the skill and responsibility of the engineer, who today is one of the most respected and efficient of railway employes? (2) Will not his status,

and incidentally his salary be reduced towards the level of the subway and elevated engineer, or motorman, who, as a cynical manager remarked with a degree of exaggeration at the time of a strike, could be reproduced with some two hours of training? (3) If an engineer is going to disregard signals, is he competent to handle a train with its many lives, and if he is constantly checked up automatically will he develop the skill, keenness, and self-reliance necessary to his work? The operating men of the railways are by no means a unit in favor of automatic train stops and emergency brakes, nor are such individuals as Mr. J. O. Fagan, the author of the "Confessions of a Signalman," and many of the representatives of the Brotherhood of Locomotive Engineers, who see in their introduction the opening wedge toward the automatic operation of trains and a system of central control.

Labor unions are blamed for retaining incompetent and mediocre men. But the unions claim that they have greatly improved the standard of the individual workman both in intelligence and sobriety, and that they have protected competent men who incurred the dislike of autocratic managers.

Railway Accidents

Rev. of Rev., 47 : 327. Article by Herbert T. Wade (1913)

During 24 years for which statistics are available,
188,037 persons have been killed,
1,395,618 " " " injured on railroads in the United States.

During year ending June 30th, 1912,
10,585 persons killed
169,538 " injured.
More than half the killed were trespassers (53%).

Many of these accidents are due to the temperament and habits of the American people. Though many millions have been spent recently on track elevation and other protective devices, the percentage of losses remains about the same. An indication of one cause lies in the fact that on the Chicago Elevated Roads (which alone have spent $70,000,000 recently) trespassing continues; and out of 339 arrested for this in a three months period but 67 were punished.

It is safe to add that their punishment was probably light.

In 1902 there were 78 accidents due to broken rails, in 1912, 363.

Rev. of Rev., 47 : 335.

From 1893–1911 there was a reduction from 11,710 to 3175 in the total of deaths and injuries in coupling accidents with vastly greater tonnage carried by the railways. This was due chiefly to inspection and prosecution carried on by the Interstate Commerce Commission.

Stamford Wreck

Sci. Am., 109 : 46, July 19, 1913.

This was due to the inexperience of the engineer. It was broad daylight, signals were set and the engi-

neer was doing his best — but he was inexperienced. The Pennsylvania Railroad said that, on their road, in case it was necessary to send an inexperienced man, a traveling engineer, or road foreman would have been sent with him.

This was the first run of a new man with an important train, totally unsupervised.

Also expert testimony declared the train to have been in unfit condition to leave the yards. There is no way, on the New Haven, of finding out whether repairs to locomotives have actually been made.

List of New Haven accidents

Fairfield, Conn.	June	8,	1911,	4	Killed,	
Bridgeport, Conn.	July	12,	1911,	12	"	54 Injured
Middletown, Conn.	Aug.	28,	"	.....	60	"
Berlin Jc., Conn.	Oct.	15,	"	2 "	5	"
Clinton, Mass.	June	11,	1912,	.....	8	"
Stonington Jc., Conn.	July	25	"	3 "	4	"
Dorchester, Mass.	Aug.	8,	"	5 "	16	"
So. Boston, Mass.	"	9,	"	7 "	40	"
Westport, Conn.	Oct.	3,	"	7 "	15	"
Greens Farms, Conn.	Nov.	16,	"	.....	17	"
Putnam, Conn.	"	17,	"	1 "	2	"
Willimantic, Conn.	"	30,	"	.....	5	"
Waterbury, Conn.	Feb.	12,	1913,	.....	15	"
Stamford, Conn.	June	12,	"	6 "	22	"
Wallingford, Conn.	Sept.	6,	(?) 1913,	21	Killed	

At the Westport wreck four women passengers were burned to death — wooden Pullman. Within a few

hours the wrecked car was taken away and *burned*. No one was held criminally liable.

Trespassers Killed

During twenty years (1912 end)
86,733 trespassers killed,
94,646 " injured on railways, 75% of them not tramps but ordinary wage earners, and many women and children.

General Comment on Railroad and Steamship Wreck and Similar Cases

In the great majority of cases under this heading it is extremely difficult to fix responsibility. The engineers and firemen of colliding railway trains are, more than half the time, killed; and can receive no punishment from society. The captain of a steamship frequently goes down with his ship. In cases of pure accident, due to no negligence, criminal or other, it is not surprising that there is no public disapproval expressed. Sometimes a manslaughter charge is made, seldom pressed, still more seldom carried through.

In America, at least, passengers on railways, steamship lines, trolley lines, etc., seem to be expected to take a sporting chance of survival. The captain of the *General Slocum* was found guilty of manslaughter and served a prison term (see case above); but he was plainly a scapegoat; and he was pardoned after serving a short sentence. There has never been any trial of the "man higher up" responsible for the frequency of fatal accidents. Various individuals and newspapers from time to time declare that these are guilty of murder in running the kind of trains they do, with such equipment; they also protest against the violations of fire ordinances and

the laws for safety appliances on steamships, in theaters and under similar conditions. Civil damages for injury are fairly easily recovered by the survivor or by the heirs of a person killed; but there seems to be little or no criminal responsibility.

The reasons for this may be many. For one thing the practice of the common law is plainly against holding men responsible except in the degree in which they intend harm; and no one believes that either train crews or directors desire to murder the passengers. Riding on trains and steamships, in elevators and trolley cars, is taken to be a sportsman's risk so far as criminality is concerned.

Another element in these decisions is the unwillingness of the public to suffer delay of business. If safety demands fewer trains or more elaborate precautions which would delay traffic, the public would apparently prefer risk to delay. The same thing may be said of crowded cars or flimsy building construction which can be had at a reasonable cost. Even where the still inadequate laws for safety are plainly violated, while there will be civil damages assessed, criminal responsibility is not imposed.

WILLY *v.* MULLEDY

78 New York, 310 — 1879

(Smith 89)

A fire took place in an apartment house in Brooklyn wherein the wife and child of the plaintiff were killed. There were no fire escapes and there was no ladder giving access to the scuttle in the roof.

The statutes provided that both such means of

escape should be furnished and the court held that the defendant was guilty — but damages alone were sought and obtained. There was no criminal prosecution.

The statute was mandatory. The defendant could not wait until notified to provide fire escapes. An absolute duty was imposed for the sole benefit of tenants. "It is a general rule that, whenever one owes another a duty, whether such duty be imposed by voluntary contract or by statute, a breach of such duty causing damage gives a cause of action. Duty and right are correlative; and where a duty is imposed, there must be a right to have it performed."

Self-Defense

PEOPLE *v.* TOMLINS

213 New York, 240.

Newton Tomlins shot and killed his son, a young man of twenty-two on August 26th, 1913, at Stony Point (N. Y. ?). The father claimed that "he acted without premeditation when blinded by passion because of blows and insults and that he had acted justifiably in lawful self-defense in his own house." He was judged guilty of murder in the first degree. The judge who renders the opinion on appeal says that this verdict is based upon ample evidence. Nevertheless judgment of conviction was reversed and a new trial ordered upon the ground that the father was in his own home, that he was not bound, as in other cases

of self-defense, to escape and take refuge somewhere. His natural place of refuge was where he then was in his own home.

THROWING PERSONS OVERBOARD TO LIGHTEN LEAKY BOAT

UNITED STATES *v.* HOLMES

(1 Wall. p. 1. From "Milburn's Curious Cases," pp. 382 ff. 1842.)

The American ship *William Brown* was wrecked on an iceberg two hundred and fifty miles S. E. of Cape Race on the 19th of April, 1841. On the following morning two boats put off from the ship containing *all* of the crew and thirty-three passengers. Thirty-one passengers perished on the ship itself. The long boat contained the first mate, eight seamen, of whom the prisoner was one, and thirty-two passengers. Holmes, an admirable seaman, had behaved with great gallantry at the time of the wreck. The long boat was dangerously overloaded and leaky. By hard work, in a quiet sea, the boat was kept afloat for two days. Then the sea rose and rain fell heavily. The danger became extreme and Holmes, under the orders of the mate, who had had similar orders from the captain before leaving the ship, cast overboard fourteen persons, all the male passengers, with the exception of two married men and a small boy. No one of the crew was cast over.

The mate directed the crew "not to part man and wife and not to throw over any women." There was

no other principle of selection. There was no evidence of combination among the crew. No lots were cast; nor had the passengers, at any time, been either informed or consulted as to what was now done.

The boat was picked up shortly after and the remainder of the company rescued. Holmes was tried for manslaughter. His admirable character was testified to without dissent and it was recognized that he had been a most valuable man in the preservation of boat and boat's company. It was he who discovered the rescuing vessel and signaled to it.

At the trial much weight was placed upon his necessary obedience to the orders of the mate (who, for some reason, appears not to have been tried). It was recognized by all that the emergency was desperate and that, at the time when danger threatened and the fourteen were cast overboard, it was night and stormy.

The law of necessity was not held to apply to make this a case of justifiable homicide. The sailor is held to "owe more benevolence to another than to himself." Doubtless there would have been an acquittal had lots been cast to include the crew.

As it was the jury declared him guilty, with a recommendation to mercy; and the judge with all humanity and evident reluctance, pronounced the very light sentence of six months' imprisonment and twenty dollars fine; which penalty was subsequently remitted.

GENERAL COMMENT ON SUICIDE

Obviously the State cannot punish a successful suicide; but attempted suicide is a crime throughout the entire Western world. Under certain conditions in Japan it is considered heroically virtuous; but the laws of practically all occidental states punish the attempt with heavy penalties — nominally. Actually, very little attention is paid to it. Both its punishment in our own civilization and its praise in certain parts of the Orient seem to be connected with religious ideas, although one may surmise that there is a scarcely conscious feeling that the life of the individual belongs to the state and that he may not take it without the sanction of the state.

The attitude of insurance companies toward suicide has changed of recent years. The fact that most policies are valid even in case of death by suicide, after they have been in force for one year, points, I think, to a certain confidence that the great majority of cases of suicide are due to a disordered mind and that the small residue of cases is negligible, rather than to any modern approval of self-killing; though there is evident a distinct lightening of the social disapproval.

The old custom of burying the suicide at a cross roads with a stake driven through his heart never prevailed in this country and there is no bill of attainder or forfeiture of goods permitted under our Constitution.

Assault and Battery

A few assault cases are given as throwing light on the general nature of killing.

COMMONWEALTH *v.* WHITE

(Massachusetts 1872)

The defendant was driving a wagon along a highway which Harrington, one Sullivan and others were repairing; that Sullivan called out to the defendant to drive in the middle of the road; that the defendant made an offensive reply; that thereupon Sullivan came toward the defendant and asked him what he meant; that Sullivan and Harrington were about fifteen feet from the defendant, who was moving along all the time; that the defendant took up a double-barrel gun which he had in the wagon, pointed it towards Sullivan and Harrington, took aim at them, and said, "I have got something here that will pick the eyes of you." This was all the evidence. Sullivan testified that he had no fear; but it was evident that Harrington was in fear. The defendant testified that the gun was not loaded.

The judge ruled that it was not necessary to prove a threat to shoot.

The defendant asked the judge to instruct the jury that the facts testified to did not constitute an assault.

The instructions required the jury to find that the acts were done "menacingly."

It is not the secret intent of the assaulting party nor the undisclosed fact of his ability or inability to commit a battery that is material. It is the outward demonstration that constitutes the mischief which is punished as a breach of the peace.

Defendant found guilty. Exact punishment not stated.

REGINA *v.* DADSON

Crown Case Reserved, 1850

(Reported 4 Cox C. C. 358. Beale, p. 502.)

George Dadson was a constable employed to guard a copse. He saw William Waters coming from the copse carrying wood which he was stealing and called on him to stop. He would not stop but ran. Dadson fired and wounded him in the leg. Waters had him tried and convicted on a criminal assault charge. The case was appealed or referred.

Pollock, C. B. said, "We are all of opinion that the conviction is right. The prosecutor not having committed a felony known to the prisoner at the time when he fired, the latter was not justified in firing at the prosecutor; and having no justifiable cause, he was guilty of shooting at the prosecutor with intent to do him grievous bodily harm, and the conviction is right." [1]

[1] Cf. with Foster C. L. 267 above.

Cf. also cases of strikers killed by special constables in Colorado, at Roosevelt, N. J. and other places.

Assault — Self-Defense

ANONYMOUS

COMMON PLEAS, EASTER TERM, 1455.

(Year Book, 33 Henry VI, folio 18, *placitum* 10, Ames 106.)

Prisot, C. J. This is no plea to the threats, without more; for if one assaults you to beat you, it is not lawful for you to say that you will kill him, and to threaten his life or limb; but if the case is one where he has you at such an advantage that by intendment he would kill you, as if you should flee from him, and he, being swifter than you, should pursue you so that you could not escape; or, again if you are under him on the ground; or if he has chased you to a wall, or hedge, or dike, so that you cannot escape him, . . . then it is lawful for you to say that if he will not depart from you, you, to save your life, will kill him, and so you may threaten him for such special cause.

By the Penal Law of New York, Art. 20, *Sec.* 246, the use of force is not unlawful when necessarily committed by a public officer in the performance of a legal duty, or by any person assisting him, etc.; in self-defense or defense of another whose person or property is assailed, providing the defense is not excessive; or by parents and their agents for correction of children; or by carriers of passengers and their agents in ejecting offenders, the vehicles first having been stopped and no undue force having been used; or by the proper restraint of insane persons, idiots, etc.

COMMONWEALTH *v.* ADAMS

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1873.

(Reported 114 Mass. 323. Beale 291, 3d ed.)

The defendant was driving in a sleigh down Beacon Street and was approaching the intersection of Charles Street, when a team occupied the crossing. The defendant endeavored to pass the team while driving at a rate prohibited by an ordinance of the City of Boston. In so doing he ran against and knocked down a boy who was crossing Beacon Street. No special intent on the part of the defendant to injure the boy was shown. The defendant had pleaded guilty to a complaint for fast driving, in violation of the city ordinance.

He was held guilty by the trial court on the ground that intent to violate the city ordinance supplied the intent necessary to sustain the charge of assault and battery; but the Supreme Court reversed this decision and ordered a new trial on the ground that the defendant was merely doing a prohibited act — not an act evil in itself. It was not necessary to prove evil intent in violating the city ordinance. Violation in itself is sufficient and he can be punished for that — but the violation of an ordinance is not necessarily either a felony or anything resembling it. Therefore a misadventure resulting from this violation does not make one liable to punishment for assault.

Cf. also *State* v. *Horton* (Beale 293, 3d ed.) where

a man who had been hunting mistook another for a wild turkey and killed him. He had violated a local ordinance of the legislature in so hunting on another man's land but had not been hunting carelessly nor was hunting forbidden at that season of the year. He was adjudged guilty of manslaughter by the trial court but given the very light punishment of four months in the county jail. On appeal to the Supreme Court he was declared innocent on the ground that the act he had committed was merely a prohibited act and indicated no felonious intent.

STATE *v.* WM. BECK AND OTHERS

So. CAROLINA, 1833

(1 Hill L. 363. "Milburn's Curious Cases," p. 294.)

One of the defendants had lost leather, and suspecting it was stolen, got Beck and other defendants to aid him in the search. They found the leather on the premises of Noble Anderson, and immediately took him into custody, whether under a warrant or not did not appear. Whilst in this state, some one, not Beck, asked Anderson if he would not rather be whipped than go to jail. He replied that he would and then requested Beck to whip him. Beck at first hesitated, but finally, at the earnest entreaty of Anderson, and saying, "If it will oblige you, I will do it," consented; and Anderson putting his arms around a tree, he gave him a few stripes with a switch. Anderson was then

released, but was afterwards prosecuted, convicted and punished for stealing the leather.

Thereupon the defendants were charged with assault and battery and the presiding judge declared Beck clearly guilty. He moved for a new trial. The Court of Appeals reversed the decision of the lower court. A battery is generally defined as injury done to the person of another in a rude, insolent or revengeful way. Negligence may also give ground for such a charge. But where there is no intention to injure and no negligence, no offense may be imputed. However ill judged the act may have been, it did not constitute an assault and battery.

Military Discipline

New York Times, July 23, 1916.

Private Henry Scheiner was charged with an attempt to escape from the guard-house and an assault on Corporal Zenger while serving with Battery D, First Field Artillery, on the Mexican border during our trouble with Mexico.

It was alleged that Scheiner had thrown Zenger to the ground and taken his pistol and had bitten the hand of Private Segrist when the guard tried to restrain him.

He was found guilty by a military court and sentenced to dishonorable discharge, forfeiture of all pay and allowances, and a term of one year at hard labor in the Federal Penitentiary at Leavenworth, Kansas.

THE WAGER OF BATTLE

By Hayne Davis

Outlook, 73 : 927.

In our day, if two individuals have a dispute over the ownership of land, they go to the courts of that nation in which the land is situated and produce the evidence on which each claims to be the owner of the land, and the court adjudges that the land belongs to him who proves the better title to it. It is hard to realize that, for the trial of such controversies in England, there was at one time no way provided by the laws except battle between the adverse claimants or their champions. Yet such was the fact prior to the time of Henry II. In his time (middle of the twelfth century) the Government authorized the trial of such controversies by jury, if the parties were so disposed, at the same time leaving the disputants free to prove their contentions in the old way of battle.

Under the laws of England, certain crimes are punishable by death; others, in former centuries, were punished by mutilating the body of the convict, on the idea of an " eye for an eye." In all crimes punishable by death or by mutilation of the body, two accusations for the same offense were allowed, one by the State, the other by the next of kin of the person injured. The accusation by the next of kin was called " appeal " of murder or arson, etc., and the trial in such accusations was by evidence to court and jury, or by battle

between the accuser and accused, as the latter preferred.

Such being the law of England, the right to wage battle was demanded under the following circumstances:

At seven o'clock in the morning on May 27, 1817, the dead body of a girl named Mary Ashford was found in a pond near Birmingham. She had left a dance at midnight of May 26th in company with Abraham Thornton. They were seen together going homeward at three A.M. At the dance Thornton was heard (not by Mary Ashford, but by another) to say something which pointed to him as the murderer. When arrested, blood was found upon Thornton, so as to point to him as the criminal even without the other circumstances. Thornton was indicted on a charge of murder and rape, and was acquitted by a jury on both charges. Thereupon William Ashford, the brother of the dead girl, brought an appeal of murder against him. It was in such accusations of crime that the right of battle existed, and on March 16, 1818, Thornton pleaded to the appeal " Not guilty, and I am ready to defend the same by my body," and thereupon, taking off his glove, he threw it upon the floor of the court. The prosecution was surprised. They expected another trial by jury. A discussion followed, in which counsel for Ashford undertook to show that the right of trial by battle was not allowable in the case, but the court decided unanimously that it was.

Lord Ellenboro, the Lord Chief Justice of England,

said, in delivering the opinion: "The general law of the land is in favor of wager of battle, and it is our duty to pronounce the law as it is, not as we may wish it to be. Whatever prejudice may exist against this mode of trial, still, as it is the law of the land, the court must pronounce judgment for it." Ashford's counsel took time to consider, and a few days later notified the court that Ashford would not accept the wager. Thereupon, on Monday, April 20, 1818, the case was dismissed and Thornton released. He came to America and was lost sight of. William Ashford, one of the parties to this suit, lived until 1867.

Comment. Had the prosecutor of the "appeal" of murder taken up this challenge and been killed by the defendant, the said defendant could not have been held by any law of England, although he might have been guilty of the original murder as well as this — in such a case — legal killing. And had the prosecutor killed the defendant, who might have been innocent, there would equally have been no law to touch him. The Wager of Battle was a legal duel closely akin to trial by ordeal which presupposed that God would judge in favor of the innocent.

The Wager of Battle is no longer legal in England nor, so far as I know, anywhere. It is an interesting combination of the original method of combat between opponents and of state action.

Duel — Wager of Battle

TRIAL BY COMBAT

George Neilson, p. 330

In this book the Ashford-Thornton case of appeal of murder is given and then Neilson adds "The case did not stand alone. In Ireland in 1815 a murderer, named Clancy, had escaped similarly by an unexpected offer of battle, when he was put on trial at the assizes. Immediate legislation was therefore necessary to prevent the thing from becoming a standing obstacle to justice. The appeal of murder of which wager of battle formed an inherent part had been defended in Parliament in 1774 as "that great pillar of the constitution." In 1819 this great pillar has become a dangerous nuisance, and a bill was brought in to take it away. After not a little parliamentary eloquence and several petitions, it was read a third time in the House of Commons on 22nd March by a majority of 64 to 2. On 22nd June it received the royal sanction and became law. . . . This provision made an end of wager of battle.

Comment. Dueling has now been for many years forbidden by law in the United States and Great Britain in the army and navy as well as in civil life. In past times, however, the most celebrated and distinguished men have fought duels which were not only contrary to law but fully approved by a certain public opinion. The

popular sympathy with Hamilton in the famous duel between Aaron Burr and Alexander Hamilton had much to do with the change of public opinion which led to the delegalizing of the duel.

It is unnecessary to say more on the subject here as the duel hardly exists anywhere in a recognizable form either in Great Britain or the United States and is fast disappearing everywhere. It is questionable, however, whether public opinion would justify the execution of a man who should even to-day kill a man in a duel; for, however unfair his conduct might be, it would still be considered by the majority of people a "fair fight" or one in which, at least, the other had a "sporting chance."

Dueling

Austria, 1900

A young lieutenant of Hussars, the Marquis Antoine Tacoli, who had served for seven years in the army; taking upon himself to defend an Archduke whom another officer, Monsieur Szilay, was speaking against, was insulted by the latter. Immediately everything was done to force Tacoli to challenge Szilay to a duel. Tacoli refused on the ground that he was a Catholic. He was branded as a coward, deprived of his commission and placed in the reserve as a private soldier. Later he was registered as a common soldier as the rank of private was considered too honorable for him.

. . . . . .

In 1911, Emperor Francis Joseph issued an order directing that, wherever possible, his officers should

seek redress for indignity and insult, not through the practice of dueling but through the law courts. No duels are to be fought among officers for trifling causes but only for the most serious matters, and then not until a court of honor, composed of the disputants' fellow officers, has declared that no other course is open to them. (*Outlook,* 99 : 400.)

Duels on the Continent of Europe

(See *Cur. Lit.* 28 :168. *Fortnightly Rev.,* August 1908. *R. of R.'s,* 38 : 495.)

Prince Alfonso de Bourbon et Autriche-Este formed an Anti-Dueling League.

In the spring of 1900 two Austrian officers, excellent friends, agreed to fight a duel because of some remarks made by one of them, but they made up their dispute almost immediately and no longer wished to fight. In spite of this their seconds *obliged them to do so.* Although one of the two thought he fired in the air, he actually shot the Comte de Bissengen dead on the spot. The Comte left a young wife, who was *enceinte,* and two little children.

Outlook, 103 : 518, March, 1913.

In the Bundesrath a resolution adopted in the Reichstag a year and a half before, asking that dueling in the army be effectually prohibited, was rejected. The Bundesrath gave countenance to dueling when conducted " upon ideal grounds." It declared that no

end could be put to dueling until measures were taken to apply not only to the army but to all classes.

But, as noted, the Austrian Emperor endeavored to restrict if not to abolish the duel. The late Russian Emperor opposed it for all but the most serious offenses. General Kuropatkin had urged the Czar to abolish it entirely among officers and the Italian King is most seriously opposed to the duel.

(Article in *Fortnightly*, 90: 169, 1908, gives full history of Anti-Dueling League.)

Century Magazine, Vol. 59 : 478. Date, 1900.

Sir Walter Scott, whose fine sense of honor is thrice proven, was charged by General Gouraud, one of Napoleon's attendants at St. Helena with making improper reflexion upon him in Sir Walter's " Life of Napoleon." It was rumored that he would call the historian to personal account for this. Scott was entirely willing to settle the matter *off* the field of honor. He would show the general his authorities, but if he should ask " any apology or explanation for having made use of his name " it was " his purpose to decline it and stand to consequences." He was aware he could " march off upon the privileges of literature " but he had no taste for that species of retreat; " if a gentleman says to me, I have injured him, however captious the quarrel may be, I certainly do not think as a man of honor, I can avoid giving him satisfaction without doing intolerable injury to my own feelings, and giving rise to the most malignant animadversions."

Fortunately he was not called upon to fight a duel; but he showed unmistakably that, in spite of his age, he would have so fought had he been challenged.

In the same article reference is made to a duel between a friend of his son-in-law Lockhart and one who had assailed Lockhart in a literary controversy, — "Sir Walter was shocked at his (the assailant's) death but the moral he drew was not abstention from the field of honor but the desirability of a less satirical style on the part of Lockhart."

Mention is made also of Robert Browning's approval and Elizabeth Barrett's disapproval of dueling.

Euthanasia

In Chicago, November 17th, 1916, Dr. J. Haiselden refused to operate to save the life of the child of Mr. and Mrs. A. Bollinger, on the ground that the child, born defective in body and also probably in mind, would be better permitted to die than live an imbecile. The child died. The coroner's jury declared that it found no evidence that the baby would have become mentally or morally defective and expressed the belief that its physical defects in a measure might have yielded to plastic treatment.

The physical defects found included many malformations — fusion of the two kidneys into one located on the left side, absence of the right external ear, and of the external auditory canal, etc.

The jury, composed of six leading physicians and surgeons, declared that Dr. Haiselden was "morally

and ethically (*sic*) within his rights in refusing to operate." State's Attorney Hogue refused to prosecute, saying that Dr. Haiselden had only obeyed the parents of the child. (Article in *Information Annual,* 1915.) *Independent,* 60 : 291. 1906.

A bill was recently introduced into the Ohio Legislature providing that when an adult of sound mind has been fatally hurt, or is so ill that recovery is impossible, or is suffering extreme pain without hope of relief, his physician, if not a relative and if not interested in any way in the person's estate, may ask his patient in the presence of three witnesses if he is ready to die. If the answer is in the affirmative, then three other physicians are to be summoned in consultation, and if they agree that the case is hopeless they are to make arrangements to put the person out of pain with as little discomfort as possible.

The bill did not pass. The project was bitterly opposed by *The Independent* which expressed surprise that Charles Eliot Norton should approve of anything so crude, cruel and barbarous.

III. LEGAL: BUT NOT ALWAYS APPROVED BY THE GROUP

Foster, C. L., 267. The execution of malefactors under sentence of death for capital crimes hath been considered by former writers as a species of homicide founded in necessity. I think it hath with propriety enough been so considered; for the ends of government

cannot be answered without it. . . . Where persons having authority to arrest and imprison, using the proper means for that purpose, are resisted in so doing, and the party making resistance is killed in the struggle, this homicide is justifiable. . . . Where a felony is committed, and the felon fleeth from justice, and a dangerous wound is given, it is the duty of every man to use his best endeavors for preventing an escape; and if in the pursuit the party fleeing is killed, where he cannot be otherwise overtaken, this will be deemed justifiable homicide; for the pursuit was not barely warrantable, it is what the law requireth and will punish the *wilful* neglect of.

Foster, C. L., 262. Parents, masters, and other persons, having authority *in foro domestico,* may give reasonable correction to those under their care; and if death ensueth without their fault, it will be no more than accidental death. But if the correction exceedeth the bounds of due moderation, either in the measure of it or in the instrument made use of for that purpose, it will be either murder or manslaughter according to the circumstances of the case.

REX *v.* COMPTON

Assizes, 1349

H. de Compton was indicted for feloniously killing H. Vesey. It appeared that said Vesey and others had been indicted for various felonies and that de Compton

and others had warrants for their arrest. These warrants were shown and their surrender demanded. They would not surrender but fought with the officers. Divers persons were killed in the melée, among them Vesey. The indictment of de Compton was for this killing.

The jury found him not guilty.

Thorp, C. J. "They have acquitted you of this charge, and we acquit you. And I say well to you that when a man kills another by his warrant he may well avow the fact, and we will freely acquit him without waiting for the King's pardon. . . . And in many other cases a man may kill another without impeachment, as if thieves come to rob a man, or to commit burglary in his house, he may safely kill them, if he cannot take them. And note, how it was with a gaoler who came to the gaol with a hatchet in his hand, and just then the prisoners had broken their irons, and were all ready to have killed him, and they wounded him sorely, but with the hatchet in his hand he killed two, and then escaped, etc. And it was adjudged in this case by all the council that he would not have done well otherwise, etc. Likewise he said that every person might take thieves in the act of larceny, and felons in the act of felony, and if they would not surrender peaceably, but stood on their defense, or fled, in such case he might kill them without blame, etc."

STOREY *v.* STATE

Supreme Court of Alabama, 1882.

(Reported 71 Alabama 329. Beale, p. 511.)

Storey was convicted of the murder of Josiah Hall whom he had killed when in pursuit of him for the purpose of recapturing a horse "which the deceased had either stolen, acquired by fraud, or else unlawfully converted to his own use."

Somerville, J. cites many authorities, text book writers as well as judicial opinions. From his opinion I may quote the following:

"The question is presented . . . as to the circumstances under which one can kill in order to prevent the perpetration of a larceny which is made a felony by statute . . . a subject full of difficulties and conflicting expressions of opinion from the very earliest history of our common-law jurisprudence. The broad doctrine intimated by Lord Coke was that a felon may be killed to prevent the commission of a felony without any inevitable cause or as a matter of mere choice with the slayer . . . (3 Inst. 56). If such a rule ever prevailed, it was at a very early day, before the dawn of a milder civilization, with its wiser system of more benignant laws; for Blackstone states the principle to be, that 'where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting' (4 Comm.

181). . . . Both of these views have been repudiated by the later authorities. . . . One may, as Mr. Bishop expresses it, 'oppose another who is attempting to perpetrate any felony, to the extinguishment, if need be, of the felon's existence' (1 Bish. Cr. Law 849–850). . . . but 'the practical carrying out of the right thus conceded, is, in some circumstances, dangerous, and wherever admitted, it should be carefully guarded' (Par. 855). Mr. Greenleaf confines the rule to 'the prevention of any atrocious crime attempted to be committed by force; such as murder, robbery, house breaking in the night time, rape, mayhem, or any other act of felony against the person.'

"It is said by *Nicholas, J.* (*Gray* v. *Coombs*) that the right to kill in order to prevent the perpetration of crime should depend 'more upon the character of the crime, and the time and manner of its attempted perpetration, than upon the degree of punishment attached by law.' There is much reason in this view, and a strong case might be presented of one's shooting a felon to prevent the asportation of a stolen horse in the night-time, where no opportunity is afforded to recognize the thief, or obtain speedy redress at law. Both the Roman and Athenian laws made this distinction in favor of preventing the perpetration of theft by night, allowing, in each instance, the thief to be killed when necessary, if taken in the act (4 Black. Comm. 180, 181).

"The alleged larceny in the present case, if it occurred at all, was in the open daylight, and the defend-

ant is not shown to have been unable to obtain his redress at law. 'No man, under the protection of the law,' says Sir Michael Foster, 'is to be the avenger of his own wrongs.'"

Punishments under the Articles of War.

The following offenses are punishable by death; striking a superior officer, mutiny, sleeping at sentinel duty, misbehavior before the enemy, compelling a surrender, disclosing the watchword, corresponding with the enemy, desertion in time of war or advising to desert, forcing safeguards during a rebellion.

These punishments are, of course, those allotted to soldiers and they are to be tried by courts martial.

Comment. Needless to say there are few such cases tried and fewer still result in convictions and the actual carrying out of the death sentence. They are all, however, closely akin to treason and doubtless there may be cases of each; but the records are exceedingly private and scanty.

IV. SEMI-LEGAL

CASES OF LYNCH LAW

From "Lynch Law," by J. E. Cutler

(*P.* 44.) "In the Province of New Hampshire in June, 1753, two white men killed two Indians who were accused of having carried off two negroes the preceding year. After several months the men were ar-

rested, indicted for the murder, placed in the jail at Portsmouth, and their trial set for March 21st, 1754. The night previous to the day appointed for the trial a party of their neighbors appeared in Portsmouth, broke open the jail and set them free. This outrage produced great excitement in the community — some endeavoring to discover and retake the murderers, and others favoring their escape. Both the murder and the rescue, however, were generally justified in the community, and, although rewards were offered by Governor Wentworth for the apprehension of Bowen and Morrill, yet in a short time they went openly about their business, without fear of molestation, and the men engaged in breaking the jail at Portsmouth, though well known, were never called to account, but, on the contrary, were considered as having performed a most meritorious act. In fact, some of the most substantial men in the country were engaged in the rescue, — by act or advice, — and the Government could not have made an arrest had they made the attempt. Presents were afterwards made to the relatives of these Indians by the Government of New Hampshire, and thus the ' blood was wiped away ' to the satisfaction of the Indians." (New Hamp. *Provincial Papers,* VI, 262–66.)

During the 22 years from 1882 to 1903 inclusive, the total number of persons lynched in the United States was 3337, the number decreasing during the last decade; of these 2385 were in the South and 752 in the

North; of those lynched in the East and West 602 were white and 75 black, and of those in the South 567 were white and 1985 black (South, former slave states, West, territory west of Mississippi River excluding Mo., Ark., La., Tex. and Okla.; East, east of Miss. excluding slave states. E. & W. make up North.) Lynchings occur mostly in periods of idleness of the lower classes; in the summer more are lynched for crimes against the person and in the winter (in the West) for crimes against property; more blacks than whites were lynched between 1882 and 1903, the numbers being 2060 negroes of whom 40 were women, and 1169 white, of whom 23 were women; of the 707 blacks lynched for rape 675 were in the South; 783 blacks were lynched for murder, and 753 of these were in the South; most of the lynchings of whites were in the West, the lynching of negroes increased somewhat outside the South and decreased somewhat in the South. (*Ency. Brit.*, 11th ed.)

Lynch Law in North Carolina, 1765–71

(*Condensed from Cutler's Book, pp.* 48 ff.) In North Carolina at this period frontier conditions were utterly lawless. Prior to 1769 the only court of civil and criminal jurisdiction in the Province was at Charlestown: which was so far away as to give practical immunity to those lawlessly inclined. The inhabitants had early petitioned for the establishment of more local courts, but, failing to secure them there was

established an association known as the Regulators, whose *raison d'être* was primarily the regulating of "public grievances and abuses of power." But they were much like earlier Regulators in their procedure.

These Regulators, in number about 150, September, 1770, "attacked the Superior Court which was in session at Hillsboro, severely whipped several men who had incurred their enmity, and destroyed considerable property."

They were not put down until after a pitched battle between them and the Militia.

Comment. This case is interesting as exemplifying revolt against insufficiency and tyranny of their government rather than as a necessary means of enforcing order against bandits and murderers (see especially p. 49 in Cutler).

FRANK CASE

See Supreme Court of the U. S., Feb. 25, 1915. Also Inf. Ann., 1915, p. 267.

Leo M. Frank was sentenced on May 10th, 1915, to be hanged on June 22nd, for the murder of Mary Phagan. The details of this killing are familiar through many newspaper accounts and do not concern us here, whether Frank was guilty or innocent. Many unprejudiced persons believed him to be innocent. The Georgian Supreme Court had refused to release him on *habeas corpus* proceeding. His attorneys had contended that the trial court lost jurisdiction by abdicat-

ing its functions through fear of mob violence and by arranging for Frank to remain out of court when the verdict was announced. This decision was appealed from to the Supreme Court of the United States which affirmed the decision of the Georgia Court. The United States Supreme Court held that Frank's allegations of hostile tumult in and about the court room had been rejected by competent state tribunals as untrue. Justices Holmes and Hughes dissented. They contended that Frank had made out a *prima facie* case of interference with the deliberations of the jury through the prevalence of mob spirit in and about the court room which should entitle him to a review.

Thousands of letters and telegrams requesting a commutation of the sentence to imprisonment for life were received by Governor Slaton and other authorities. Governor Slaton did so commute the sentence on June 21st after the Georgia Prison Commission had refused to recommend it. This decision was reached barely twenty-four hours before the time set for the execution and after Frank had been taken secretly from the Fulton County Jail to the state prison farm at Milledgeville. "Feeling as I do about this," said the Governor, in giving his statement, "I would be a murderer if I allowed this man to hang. It means that I must live in obscurity the rest of my days, but I would rather be plowing in a field than to feel for the rest of my life that I had that man's blood on my hands."

Mobs threatened the Governor's home for several

days, but were quieted by troops. On the 26th a demonstration occurred at Atlanta when Governor Slaton retired from the executive office. With cries of "Lynch him!" the rioters attempted to seize the Governor who escaped bodily harm only through the protection of a large force of police and state troops.

Frank, while serving his sentence, was attacked while asleep July 17th, by William Green, a fellow convict, who was serving a sentence for murder. Though his neck was nearly cut in two, he did not die of these injuries. He was kidnapped by a mob who overpowered the prison authorities on August 16th, taken by automobile to Marietta and hanged in a grove within a stone's throw of the birthplace of Mary Phagan.

An investigation of the lynching was made by the Grand Jury of Cobb County which reported that there was no evidence sufficient to enable them to indict any one. Five guards and deputy wardens were discharged as a result of this lynching.

Comment. The points to be observed are that mob spirit ruled throughout and completely superseded the ordinary processes of law. Governor Slaton's career was ruined, the persons who committed the lynching were evidently approved by the spirit of the community. Frank's chief crime apparently was that he was a Jew.

KU KLUX KLAN — VIGILANTES

New York Times, Editorial, Sept. 26, 1916.

Apropos of the proposal to erect a statue to Colonel McAfee, the founder of the Ku Klux Klan, the editor

quotes the *Montgomery, Ala. Advertiser* as follows: "Kukluxism is an interesting phase of Southern civilization, an institution that rose up to do a definite thing and disappeared when its purpose had been accomplished. It will live always in the lore of this people."

The editor then comments that, owing to Mr. Thomas Dixon, this generation is being taught to idealize the Klan. "After the McAfees let go of it, it fell into the hands of scoundrels and committed many bloody and shameful outrages. In the beginning, however, it was an uprising like that of the San Francisco Vigilance Committee, for which no Californian will ever dream of apologizing.

It was the uprising of Confederate soldiers against an intolerable tyranny. It was violent and lawless, but so was the San Francisco revolt; both were cases where civilization was prostrate under the feet of ignorance and vice."

The Ku Klux afterwards became the instrument of tyranny and crime; the Vigilance Committee did not.

"It is more the North than the South that has reason to blush at the name of the Ku Klux Klan; that name recalls a time when men took the law into their own hands, but it recalls still more the unclean tyranny that forced them to do so; and of that tyranny the North has long repented."

GENERAL COMMENT ON LYNCH LAW

Lynch law is peculiarly characteristic of American life but not confined to it; nor is it limited to any one section of the United States, as the records show. The crime for which people are usually lynched is the crime of being a member of a race both despised and feared; but this is not always so. There can be no doubt that lynching at present is a manifestation of barbarism, a complete negation of law and government; but that was not true of the early lynchings, of the Vigilantes in California nor perhaps of the Ku Klux Klan at the beginning.

Those movements represented law and order and were a terror to evil doers. That they degenerated into pure lawlessness must not blind us to their initial character, which was quasi-judicial. The killings and burnings of which lynchers and the like are guilty today are then murder pure and simple, mob murder. The simple fact is that no one has yet been executed for this type of murder. It is an apparent exception to the law that murder always results in total exclusion from the society in which it is committed. It would seem that this toleration of murder is explained, not by the fear that the accused will not get the full penalty of the law, but by the determination to impose something more than the law and to strike terror into the negroes especially, since a negro is emphatically looked upon as an alien, member of another and hostile group, whom one may kill without impropriety and

with positive credit. It seems likely that this will always be the case to some extent. Lynchings of negroes occur in the South very much more frequently than in the North, since the negroes are a menace, they being in so great numbers, often in large majority, whereas there are so few of them relatively in Northern States that there is no fear of dominance.

Judge A. W. Tourgee says (53d Congress Senate Report 113, Part 2, p. 11): "The victims of these outrages (Ku Klux) in almost every case belonged to one of the following classes: (*a*) colored men; (*b*) white men who acted with the blacks politically; (*c*) renegade members of the Ku Klux Klan, or of the Democratic party."

"Fraud in elections was excused in reconstruction days in the South. Everyone who has been at all familiar with the state of feeling there knows that this wholesale system of fraud is a matter of boastful jest with the very best of citizens. They do not deem it a matter of wrong or evil because, as they say, 'it prevents nigger rule.' This public opinion is the safeguard of any unlawful act having a like object in view."

(In the same report there are excerpts from various codes of Southern States, of great interest.)

The Governor of North Carolina June 27, 1894, in a letter to a clergyman in New York, after recounting the orderly process of the law even in some horrible cases of rape and murder, adds "if now and then there are cases of lynching, it is not because the person who committed it is a negro, but because the circumstances

surrounding the commission of the crime is (*sic*) so revolting, that the people are aroused and under the influences of the moment, the idea takes possession of the crowd that swift vengeance must be meted out to such a villain and brute."

Note that five Italians were lynched in Louisiana in 1894 for a murder not entirely unprovoked. They were probably regarded as aliens to a considerable extent — members of a hostile group; but this will not explain all lynchings, nor the failure to punish them.

V. DOUBTFUL

Assassination

New York Times, August 9, 1916.

The jury that will hear a $100,000 suit filed yesterday in the Supreme Court will be called on to determine if an assassin is a murderer. The plaintiff is Miroslav Sichinsky, a Ukranian lecturer and editor, who, on April 12, 1908, shot and killed Count Andreas Potocki, Governor of Galicia, in Lemberg. Sichinsky is suing George Raffalovich of the same nationality, who is a writer under the name of "Bedwin Sands."

Sichinsky admits in the complaint against Raffalovich that he killed Count Potocki, but he contends that to call him a murderer merely on that account is to impute moral turpitude, whereas the Department of Commerce and Labor decided last December, when he was admitted at Ellis Island after protracted hearings

in his case, that the assassination of the Galician Governor was a political act, which did not affect his right to enter this country or unfit him to become a citizen if he chose.

Sichinsky's chief complaint against the defendant is that Raffalovich, in a circular letter addressed to Ukranians in this country, called him a "murderer" and "gunman," and he denies very stoutly that he is either.

CASE OF COLONEL SEXBY

AUTHOR OF THE PAMPHLET "KILLING NO MURDER," PUBLISHED IN 1657.

"A direct incitement to the assassination of Oliver Cromwell. On its title page it professed to be by William Allen but its real author seems to have been the Colonel Sexby, a leveller, who had gone over to the Royalists and in 1656, having come from Flanders to shoot Cromwell, joined the Protector's escort in Hyde Park and almost secured his opportunity. But he went back to Flanders leaving . . . money . . . with Miles Sindercombe who was to do the deed." Various attempts failed. Many aided and abetted and the thing was known "to the prince who was afterwards Charles II."

Sindercombe was betrayed by Henry Toope, a Lifeguardsman, was arrested, tried, convicted and sentenced to death, but took poison on the day before that which had been appointed for his execution. Then

Sexby wrote and printed his pamphlet and traveled about England in disguise distributing it. He was after a time arrested and sent to the Tower, where he became mad and died within a year.

Taken from the Introduction to Henry Morley's "Famous Pamphlets," G. Routledge & Sons.

RITUAL MURDER MYTH

Independent, Nov. 20, 1913.

The jury in the Yuchinsky murder case, after deliberating an hour and a half, brought in a verdict of acquittal for Mendel Beilis on November 10th. The verdict is ambiguous because the two questions put to the jury were so framed as to leave an imputation of ritual murder.

A Christian boy employed at the Zaiteff brick works, a Jewish concern, was wounded in 47 places and then murdered with the same instrument. Beilis and others were accused of the murder as having been performed for ritual purposes. The prosecution endeavored to establish the ancient accusation of the use of Christian blood in Hebrew ceremonies; but without success. Immense excitement was produced throughout the world by this trial. The Russian Government refused to receive the petition to the Czar signed by the Roman Catholic and Episcopalian bishops or any other of the American remonstrances. Similar protests in Russia resulted in punishment for the remonstrants. One hundred and twenty members of the St. Petersburg

Bar Association signed a protest against the Beilis trial and the Court of Appeals has ordered them prosecuted for it.

Comment. The guilt or innocence of the accused did not seem to matter at the trial.

There can be little doubt that the whole trial was excited by anti-semitic prejudice or that the victim was saved by the indignant public opinion of the world.

THE UNWRITTEN LAW

The Nation, New York, July 25, 1907.

Mrs. Mary E. Bowie in La Plata, Maryland, was acquitted in July, 1907, for the killing of Hubert Posey for a wrong done to Mrs. Bowie's daughter. The offense here consisted in the failure to marry the injured woman. Mrs. Bowie and her son demanded that the ceremony be immediately performed, a license having been secured. Posey refused, and Mrs. Bowie made good her alternative "that he would die right here." The killing was therefore premeditated, and no attempt was made to deny it. The jury unanimously found both not guilty.

Contrasting case — Mrs. Birdsong killed her physician after making the most serious charges against him and giving him no chance to clear his reputation. The courts condemned her to life imprisonment, but the *Nation* anticipated that she would be pardoned.

A negro case of the same kind occurred in Columbia, S. C. The offense was admitted and the jury was

white. The judge clung to the written law but the jury's verdict was *not guilty.*

The *Lynchburg News* (Va.) editorial is quoted: "Let it be known that under given circumstances her laws (Virginia's) will by implication give to man the right to kill, and the time would not be long coming when the condition would serve as excuse and shelter of defense, behind which the murderer would attempt to hide, and often succeed in the essay. A 'trumped up' pretext, collusion, conspiracy, and what not, would be the means by which many a guilty wretch could escape his just deserts." Yet, *The Nation* adds, "it finally concludes that the law should be left unwritten." A case called the "Loving Case," similar to the Bowie case above cited, had recently occurred in Virginia with an acquittal.

Statute and Common Law

From MITCHELL *v.* STATE

Supreme Court of Ohio, 1884

(Reported 42 Ohio State, 383. Beale, 6, 3d ed.)

Okey, J. In Ohio, as under the federal government, we have no common law offenses. No act, however atrocious, can be punished criminally, except in pursuance of a statute or ordinance lawfully enacted. Judge Tappan, in *Ohio* v. *Lafferty,* held that common law crimes were punishable in Ohio, but Judge Goode-

now completely refuted the soundness of that view; but it is proper to say that while the rule is well settled that a statute defining a crime and prescribing therefor must be strictly construed; still, where the legislature in defining a crime, adopts the language employed by writers of recognized authority in defining the crime at common law, the presumption is that it was intended the commission of acts which at common law would constitute such a crime, should constitute a crime under the statute, and the statute will be so construed. (Cf. *Parke, J.*, in *Mirehouse* v. *Rennell,* 1 Cl. & F. 527, 546.)

Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised.

Cf. also Blackstone's Commentaries, Book I, *passim.*

"The only method of proving that this or that maxim is a rule of common law, is by showing that it hath been always the custom to observe it."

"The doctrine of the law then is this; that prece-

dents and rules must be followed, unless flatly absurd or unjust."

The general rule is " that the decisions of courts of justice are the evidence of what is common law."

Attempts to Commit Crimes or Misdemeanors

SUMMARIZED FROM UNITED STATES *v.* STEPHENS

(Reported 8 Sawyer, 116)

" There are acts which may be fairly said to be done in pursuance of or in combination with an intent to commit a crime; but are not, in a legal sense, a part of it, and therefore do not with such intent constitute an indictable attempt; for instance, the purchase of a gun with a design to commit murder, or the purchase of poison with the same intent. These are considered in the nature of preliminary preparations — conditions, not causes — and although co-existent with a guilty intent, are indifferent in their character, and do not advance the conduct of the party beyond the sphere of mere intent. They are, it is true, the necessary conditions without which the shooting or poisoning could not take place, but they are not, in the eye of the law, the cause of either."

Dr. Wharton says (1 Wharton, C. L., sec. 181) " To make the act an indictable attempt, it must be a cause as distinguished from a condition; but it must go so far that it would result in the crime unless frustrated by extraneous circumstances."

Bishop (1 Bish. C. L., Sec. 669) says: "It is plain that if a man who has a wicked purpose in his heart does something in its nature entirely foreign from that purpose, he does not commit a criminal attempt to do the thing proposed. On the other hand, if he does what is exactly adapted to accomplish the evil meant, yet proceeds not far enough in the doing for the cognizance of the law, he still escapes punishment. Again, if he does a thing not completely, as the result discloses, adapted to accomplish the wrong, he may under some circumstances be punishable, while under other circumstances he may escape."

In *People* v. *Murray, Field, C. J.* said: "The evidence shows very clearly the intention of the defendant; but something more than mere intention is necessary to constitute the offense charged. Between preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement towards the commission after the preparations are made. . . . The attempt contemplated by the statute must be manifested by acts which would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party."

Cf. *Glover* v. *Commonwealth,* Virginia, 1889, where *Lewis, P.* delivered the opinion of the court. The Code (of Virginia) enacts that "on an indictment for felony, the jury may find the accused not guilty of the felony,

but guilty of an attempt to commit such felony." Judge Lewis further said:

"An attempt in criminal law is an apparent unfinished crime, and hence is compounded of two elements, viz.: (1) The intent to commit a crime; and (2) a direct act done toward its commission, but falling short of the execution of the ultimate design. . . . It must be something more than mere preparation."

Cf. also *Commonwealth* v. *Kennedy,* Massachusetts, 1897, *Holmes, J.*" . . . We assume that an act may be done which is expected and intended to accomplish a crime, which is not near enough to the result to constitute an attempt to commit it, as in the classic instance of shooting at a post supposed to be a man. *As the aim of the law is not to punish sins, but is to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it.*" [Italics mine, G.C.C.] . . . "Impossibility of achievement is not necessarily a defense . . . *Commonwealth* v. *Taylor,* 132 Mass. 261 . . . In the case of crimes exceptionally dealt with or greatly feared [e.g., treason or offenses against the honor of women. G.C.C.] acts have been punished which were not even expected to effect the substantive evil unless followed by other criminal acts."

In another opinion by Holmes, then Chief Justice (*Commonwealth* v. *Peaslee,* 117 Mass. 267, in 1901) a series of illustrations is used, as follows:

"When the servant of a contractor had delivered short rations of meat, by the help of a false weight

which he had substituted for the true one, intending to steal the meat left over, it was held by four judges, two of whom were Chief Justice Erle and Mr. Justice Blackburn, that he could be convicted of an attempt to steal. . . . So lighting a match with intent to set fire to a haystack, although the prisoner desisted on discovering that he was watched. So getting into a stall with a poisoned potato, intending to give it to a horse there, which the prisoner was prevented from doing by his arrest. . . . The same has been held as to paying a man to burn a barn. On the other hand, making up a false invoice at the place of exportation with intent to defraud the revenue is not an offense if not followed up by using it or attempting to use it. So in *People* v. *Murray*, 14 Cal. 159, the defendant's elopement with his niece and his requesting a third person to bring a magistrate to perform the marriage ceremony, was held not to amount to an attempt to contract the marriage. . . . However it may be at common law, under a statute like ours, punishing one who attempts to commit a crime 'and in such attempt does any act towards the commission of such offense,' it seems to be settled that the defendant could be convicted. . . ."

In *Walsh* v. *People* (Illinois, 1872) Mr. Justice Thornton after quoting Lord Mansfield, in a bribery case, as saying: "In many cases, especially in bribery at elections to parliament, the attempt is a crime. It is complete on his side who offers it," adds "Why is the mere unsuccessful attempt to bribe criminal? The

officer refuses to take the offered reward and his integrity is untouched, his conduct uninfluenced by it. The reason for the law is plain. The offer is a sore temptation to the weak or the depraved. It tends to corrupt; and as the law abhors the least tendency to corruption, it punishes the act which is calculated to debase, and which may affect prejudicially the morals of the community."

Comment. From these and similar decisions and opinions, the author may hazard two conclusions: —

1. The principle of legal decisions seems to be not to punish any act which will not *probably* bring into being a felony.

2. The law punishes only those offenses which interfere *seriously* with public safety. This is in accord with the fundamental legal maxim, *De minimis non curat lex.*

THE NATURAL LAW OF KILLING

It is obvious, from the cases cited and from the history of homicide, that society as such has never imposed any such law as, Thou shalt not kill. The law is rather the reverse of this. Pacifism has been the policy of individuals and of some religions, never the policy of states or civic bodies of any character whatsoever. The killing of an enemy of the group has always been a meritorious act. The apparent exceptions to this are not real exceptions.

No man may kill an alien enemy of England or America, for example, even in time of war except under conditions of war; but this is because the alien enemy within one's land is considered to be under the protection of the civil law and in so far not an alien. Extradition laws are now in force between most civilized countries, even between the most bitter natural enemies; but this only means that, for the civil government of criminals, the nations so allied are one, to the extent of the extradition policy.

The law then is, *no dangerous enemy of the group shall survive, if the group believes him to be an enemy, and is able to compass his destruction.* The gradations follow:

1. Killing enemies in war is always approved.
2. Strikers, rioters, mutineers, etc., are shot down

without compunction under the orders of the state when they refuse to disperse peaceably.

3. Execution by the state of those whose action threatens the existence of the state or the idea of the state, is universally practiced. The modern tendency to abolish capital punishment and substitute life imprisonment is no real exception, inasmuch as, unless this purpose is thwarted by sentimental or political pardons, life imprisonment effectively abolishes a man's membership in the group.

4. Lynch law, however corrupt it may have become, has usually arisen as a protest against weakness, negligence and inefficiency on the part of authorities. The tacit approval given to it — omitting those cases where the community is terrorized — stamps these acts as semi-legal.

5. Killing in self defense or in the defense of others, when plainly necessary to self preservation or the preservation of others, is probably a part of group opposition to enemies.

6. Sir Michael Foster's dictum was "No man under the protection of the law is to be the avenger of his own wrongs." This makes murder, as heretofore defined, a crime which must be punished by the abolition of the offender, in some way. The state has definitely taken over the avenging of private wrongs, and, however negligent the state may be in this respect, will not tolerate interference with its function. Murder and treason are fatal to the existence of any society; hence the murderers or traitors must be abolished or the society will perish. No society as such has ever committed suicide.

Manslaughter and assaults are not fatal to the idea of society but threaten its peace.

Euthanasia, practised by individuals, while not

falling under Sir Michael's dictum, would be assuming the function of God or of the state by an individual or individuals. Unless practised under state sanction and control it would be a disintegrating force and hence will not be allowed.

The *patria potestas* is now much weakened. Any punishment by a parent which should result in the death of a child would probably be deemed immoderate today by court and jury; but unless something more than parental discipline were proven, there would be no criminal action by the state in case of a death.

7. The duel could not logically survive in a state which expressly states that no words, however scurrilous and insulting, justify killing. As a matter of fact, they often do, to the extent that provocation is reckoned with in the sentence imposed. Besides, the duel is extraneous to the state.

8. With the change of religious faith the opposition to suicide and the condemnation thereof by society tends to disappear.

9. The modern practise, which begins to hold men responsible, criminally, for what were formerly deemed "acts of God" or accidental killings, is a substantiation of the principle enunciated. The present failure to punish as manslaughter, food adulterations which result in death, drug purveying, the reckless use of unseaworthy vessels, employing men in deadly trades for profit, and the like, is probably due to the lack of recognition on the part of Society that these things are inimical to its welfare.

10. No one is punished who is not responsible. The attempts to define sanity, age of responsibility, etc., have been thus far very inaccurate. No in-

sanity murders have been included here, because the judgments of courts thereon are but a mass of incoherencies.

The quotations from Foster and Hawkins, as well as numberless decided cases, show that an act must always be established as an act of the accused. The act need not be physical. *Qui facit per alium facit per se* is one of the most established maxims of the law. The law of agency is but a long variation on this theme. The competency of all not insane, nor imbecile nor very young, is never brought in question.

11. *Malice* is defined by Judge Shaw in the Webster case from the legal point of view. Our query is as to its significance.

It is, in homicide, an appeal to the primitive method of settling differences and is a denial of society, like many lynchings. Society's verdict upon it is an illustration of the old saying "Whoso sheddeth man's blood, by man shall his blood be shed." One can hardly say that the individual has usurped the function of the state since killing was originally the function of the individual; but he is claiming a function which has been entirely assumed by the state.

12. *Intent* as found in the law implies a will with power to choose another course of action. "A person must be presumed to intend to do that which he *voluntarily* and *wilfully* does in fact do, etc.," (Italics mine.) "A man is bound to curb his passions, etc.," "guilty knowledge," and similar phrases are constantly found. This is closely connected with

13. *Causation:* Which is sometimes very remote, and other causes enter in which appear to be more effective than the act of the accused. In the

Holland case the wounded man's life could probably have been saved except for his own stubbornness, yet his stubbornness is not considered anti-social while the assault was — hence the assailant must assume the consequences of his act. Compare also the Mink case where there was the same kind of remote causation, and also burglary and arson (where killing ensues), in which causation is direct. But in the Bradshaw case the element of sport, chivalry, voluntary combat approved by society, entered in. Nothing but a foul blow and proven enmity or malice could have overcome the initial disposition to regard this *accident* as at the player's risk. So with railroad accidents and such like — they seem to be regarded as a part of the inevitable evil in the world. Many of the families of victims of the *Slocum* disaster appealed for the pardon of Captain Van Schaick.

14. Killing is thus, as a consequence of all that precedes, seen to be approved by society whenever the person killed is shown to be either an open enemy without the group or a traitor to it within. The principle is well illustrated in the oration of Demosthenes against Aristocrates where he quotes the law — "And if any one shall kill a murderer or be the cause of his death, while he keeps away from the border market and from the games and Amphictyonic sacrifices, such person shall be liable to the same penalties as if he had killed an Athenian. . . . What does this mean? He considered that, if a man who has fled from his country on a charge of murder and been condemned, has once escaped and saved himself, though he ought to be expelled from the native land of his victim, it is not righteous to kill him in every place. What was the legislator's view?

That, if we slay people who have fled to other countries, others will slay those who have fled to Athens. And should this be the case, the only refuge that is left for the unfortunate will be abolished. What is this? *The power of removing from the land of the murdered to a land where none have been injured, and there dwelling in security.*" (Italics mine.)

When, by virtue of treaties, groups hitherto hostile become for any purpose one, then killing of the members of either group will be disapproved and punished. Should all groups become one in any legal sense, the crime of killing will become of universal character. Only as all human beings are recognized, legally, as belonging to the same group, with no alien outsiders, can we have the universal law, Thou shalt do no murder.

Of the Unwritten Law, so called, we can only say that it seems to be a survival of the primitive *lex talionis* which finds favor in communities where there is a sentimental chivalry persisting but not necessarily any higher standard of sex honor. It is certain, however, that public opinion in America would nowhere support the execution of any one who had thus avenged woman's honor. Perhaps this is an obscure but genuine adhesion to our principle, in that it indicates a determination to preserve the sanctity of the home.

OFFENSES OF INDIVIDUALS AGAINST PROPERTY WITHIN A CIVILIZED GROUP

Intentional wrong — always condemned

I. Directly affecting the person	Burglary Robbery Brigandage Arson Larceny — (*a*) petit (*b*) grand
II. Larceny under peculiar conditions of life	Horse and cattle stealing Poaching — game and seal Diamond mines Other mines Theft of provisions or supplies of vital consequence to owners in, e.g., war times
III. Fraud, victims deceived	Forgery Swindling Cheating, in weights and measures in misrepresentation of quality or character of goods sold Obtaining money or goods under false pretences Disseminating false news Creation of holding companies to evade law Reorganizations to evade law and to defraud Smuggling
IV. Appropriation by compulsion (not physical)	Extortion Usury Blackmail
V. Breaches of trust	Embezzlement Absconding with or misappropriating funds Combinations and reorganizations of railroads and other companies (but see above under "Frauds") Dishonest bankruptcy False entries of charges
	Alienation of affection Adultery—based upon the chattel nature

VI. Attack upon rights of property in personality	of woman under the law Bigamy Seduction Breach of promise of marriage Alimony Dower rights Libel and Slander Aiding escape of slaves — when not simple larceny Damages for death or maiming of bread winner Personal insurance

Not necessarily intentional wrong

VII. Rights as between two parties not necessarily dishonest or wishing to defraud in any way	To air, earth and water Liens Franchises Limitation of liability, tickets, baggage, damage to person, etc. Trade marks and names Trade agreements Rates and taxes (public service corporations) Inheritances Fixtures Trespass — all kinds Negligence cases — Riots Responsibility of the person, (infants, imbeciles, lunatics, etc. civilly responsible) Eminent domain Contracts Nuisances Accidental and negligent destruction of property

The property of an enemy is always to be seized or destroyed, but it is only the enemy of the group, never the private enemy.

PART II

PRESERVATION OF PROPERTY

I. DIRECTLY AFFECTING THE PERSON

Burglary

STAUNFORD, PLEAS OF THE CROWN, 30 A

" Burglars are those who feloniously in time of peace break houses, churches, walls, towers or gates, for which burglary they shall be hanged though they took nothing away. But yet they ought to have felonious intent to rob or kill or do other felony. All indictments for burglary are for nocturnal breaking.

" Burglary is a felony at the Common Law, in breaking and entering the mansion-house of another, or (as some say) the walls or gates of a walled town in the night, to the intent to commit some felony within the same, whether the felonious intent be executed or not.

" There are some opinions, that burglary may be committed at any time after sun-set and before sun-rising; but it seems the much better opinion that the word *noctanter,* which is precisely necessary in every indictment for this offense, cannot be satisfied in a legal sense, if it appear upon the evidence, that there was so much daylight at the time that a man's countenance might be discerned thereby. . . . Both an actual entry and breaking are required to complete this offense.

(1 Hawk. P. C. Ch. 17)

"Any the least entry with the whole, or but with part of the body, or with any instrument, or weapon, will satisfy the word *enter* in an indictment for burglary.

"A house wherein a man dwells but part of the year . . . may be called his dwelling house . . . whether any person were actually therein or not, at the time of the offense.

"All out buildings . . . are looked upon as a part (of the house) and consequently burglary may be committed in them."

This was law in England as early as 1554.

It has been held[1] by all the judges of England, that breaking glass in a window and with hooks drawing carpets, etc. out of the window was burglary (1584); that breaking and putting the inmates of a house in terror of their lives was burglary though there was no entering (1607); that obtaining admission by fraud and then robbing was burglary (1650); that opening the chamber door of his mistress by a servant, the said door fastening with a bolt and the servant's intent being to commit a rape, was burglary (1722); but that breaking and entering a house not yet occupied by its recent purchaser but in charge of a care-taker, was not burglary as the place could not be regarded as a dwelling house.

A thief may enter a house through a door or window left open accidentally without being a burglar; but he is one, if, after entering thus, he turn the key or unlatch

[1] Cf. cases under Burglary — Beale's Cases on Criminal Law, p. 1028 ff.

the door of a chamber with the intent to commit felony (1786).

All the above cases are from English courts. In Massachusetts in 1829 it was decided that the breaking through a net work of cords, covering a window otherwise open, constituted burglary when entering was joined to it. "It is enough that the house be secured in the ordinary way; so that by the carelessness of the owner in leaving the door or window open, the party accused of burglary be not tempted to enter."

Emott, J. (New York) in 1863 held, in the case of entering by an inner door a tenement in a house occupied by several families that "Any and every settled habitation of a man and his family is his house or his mansion, in respect to its burglarious entry."

Folger, J. (New York, 1878) in a case where the prisoner had broken into a room used for business purposes only but within the four outer walls and under the same roof as the other rooms of the building affirmed the judgment of the lower court that this was burglary. "I will say that the definition of the crime of burglary in the first degree, given by the Revised Statutes, does not, so far as this question is concerned, materially differ from the crime of burglary as given at the common law, to wit, 'a breaking and entering the mansion house of another in the night, with intent to commit some felony within the same' . . . the essence of the crime of burglary at common law is the midnight terror excited, and the liability created by it of danger to human life, growing out of

the attempt to defend property from depredation. . . . Any out-house within the curtilage, or same common fence with the dwelling house itself, was considered to be parcel of it, on the ground that the capital house protected and privileged all its branches and appurtenants, if within the curtilage or home-stall."

It was held by *Buckill, C. J.* (Alabama, 1899) that a thief who bored a hole in the floor of a corn-crib filled with shelled corn, and stole by holding a sack under the hole so that the corn ran of itself into the sack, had committed burglary — since he had broken and entered in the spirit of the law though there was no "midnight terror, etc."

Comment. In England and in the United States burglary has been clearly defined by statute and, in many places. there are degrees of burglary. It is quite unnecessary to compare the statutes of the different states on an offense so well defined as burglary.

"There is little in legislation that is original. Legislatures imitate one another. One may number on his fingers the landmarks of legislation in common law jurisdictions, and copies or adaptations of them have gone around the world." Roscoe Pound. Do we need a Philosophy of Law? (Col. Law Rev., 5: 343.)

The New York Penal Code, article 38, defines burglary in three degrees and gives the penalties therefor.

First degree — "A person who, with intent to commit some crime therein, breaks and enters, in the night time, the dwelling house of another, in which there is at the time a human being,

1 Being armed with a dangerous weapon; or
2 Arming himself therein with such a weapon; or
3 Being assisted by a confederate actually present; or
4 Who, while engaged in the night time in effecting such entrance, or in committing any crime in such a building, or in escaping therefrom, assaults any person, is guilty of burglary in the first degree."

Punishment — imprisonment in a State Prison for not *less* than ten years.

Second degree — "A person who, with intent to commit some crime therein, breaks and enters the dwelling house of another, in which there is a human being, under circumstances not amounting to burglary in the first degree, is guilty of burglary in the second degree."

Punishment — State Prison not *exceeding* ten years.

Third degree — "A person who,

1 with intent to commit a crime therein, breaks and enters a building, or a room, or any part of a building; or

2 being in any building, commits a crime therein and breaks out of the same, is guilty of burglary in the third degree."

Punishment — State Prison not exceeding five years.

Comment. The offense of burglary being clearly defined, the interest and instruction lies largely in the way in which the law is administered. There are few appeals

in burglary cases and the records of courts of first instance are too voluminous to be searched. And it would be of questionable value to search them. The same thing may be said of larceny, assaults and many other offenses and is not repeated under those headings. I have before me however the reports of the Chief Clerk of the District Attorney's Office in New York City for the years 1912–15 inclusive and I quote from them certain figures of average sentences.

Males	*No.*	*Term of Sentence*		*Average Term, Each Person*	
1912		*Years*	*Months*	*Years*	*Months*
Burglary					
First Degree	2	70	..	35	..
Second "	16	100	..	6	3
Third "	173	612	11	3	6
1913					
1st	2	10	..	[1] 5	
2nd	20	132	11	6	7
3rd	156	527	2	3	4
1914					
1st	3	43	..	14	4
2nd	15	91	5	6	1
3rd	171	547	..	3	2
1915					
1st	..	..	..	..	..
2nd	12	67	2	5	7
3rd	188	547	5	2	10

[1] Note that the minimum term is, by statute, 10 years. I think there must be error in the printing.

Robbery

REX *v.* FRANCIS

KING'S BENCH, 1735

(2 Strange, 1915. Beale, 3d. ed. p. 731.)

The defendants in this case were charged with highway robbery in that they tricked Samuel Cox, traveling on horseback to Somerton Fair, into producing money under the pretense of changing some for them. One of them then gently struck his hand and the money rolled on the ground. When Cox tried to take up the money they swore that if he touched the gold they would knock his brains out. "Whereby he was then and there put in bodily fear of his life, and then and there desisted from taking up the pieces of gold." The prisoners then took up the money and rode off. Cox pursued them for about half a mile but they struck him and his horse and swore that if he pursued them any further, they would kill him. He then desisted.

This was accounted robbery and the prisoners convicted accordingly.

Boston Paper — Probably November, 1913.

John H., the 18-year-old youth who with 15-year-old John L., held up and robbed William C., the proprietor of a tea store at 43 Washington Street of $67.70, on the evening of October 23d, was sentenced to five

years and one day at the Concord reformatory. L. was sent to the Shirley School.

H. returned to his home soon after the robbery and, when questioned by his mother about the amount of money he had, broke down and confessed. She took the boy to the municipal court the next morning and turned him over to Sergt. Tom O'Donnell. Restitution was made.

According to C.'s story, as told by O'Donnell, the tea store proprietor was counting his money when H., pointing a revolver at him, ordered him to hold up his hands. When he reached for his gun, he said that H. cried: "Don't do that; we're bandits. Pass over that money." L., who is large for his age, bound and gagged the only clerk in the store, according to C.'s story, and after securing the proprietor's revolver backed out of the store with H., the revolver covering C.

Arson

(1 Hale P. C. 569. Beale, 3d. ed. p. 133.)

"Arson must be a wilful and malicious burning, otherwise it is not a felony, but only a trespass; and therefore if A. shoot unlawfully in a hand-gun, suppose it to be at the cattle or poultry of B. and the fire thereof sets another's house on fire, this is not felony, for though the act he was doing was unlawful, yet he had no intention to burn the house thereby. . . . But if A. have a malicious intent to burn the house of B. and in setting fire to it burns the house of B. and C.

or the house of B. escapes by some accident, and the fire takes in the house of C. and burneth it, though A. did not intend to burn the house of C., yet in law it shall be said the malicious and wilful burning of the house of C. and he may be indicted for the malicious and wilful burning of the house of C."

Comment. It would be interesting and valuable to compare the punishments assigned in actual cases for this more or less unintentional arson as compared with the malicious and wilful arson; but there are no statistics to be had.

(Quoted from Beale.)

1 Hawk. P. C. ch. 18, Sects. 1, 2

"Arson is a felony at common law, in maliciously and voluntarily burning the house of another by night or by day.

"Not only a mansion house, and the principal parts thereof, but also any other house, and the out-buildings, as barns and stables, adjoining thereto, and also barns full of corn, whether they be adjoining to any house or not, are so far secured by law, that the malicious burning of them is arson, and it is said, that in an indictment they are well expressed by the word *domus,* without adding *mansionalis.*

"But it seems that at this day the burning of the frame of a house or of a stack of corn, etc., is not accounted arson, because it cannot come under the

word *domus,* which seems at present to be necessary in every indictment of arson, yet it is said that anciently the burning a stack of corn was accounted arson."

HOLMES'S CASE

King's Bench, 1634

(Reported Croke Car. 376. Beale, 3d. ed. p. 833.)

William Holmes was indicted for the burning of a house which he was occupying under a long lease. He was found guilty at Newgate; but before judgment his case was referred to the court of King's Bench. Richardson, C. J., Jones and Berkley, JJ., held that it was not felony for him to burn his own house. Britton, Bracton and other authorities held that the burning of houses is not felony unless they belong to another. The indictment had charged him with feloniously, voluntarily and maliciously attempting to burn adjacent houses. — Yet intent only without fact is not felony.

An apparently dissenting opinion is given which holds that this was a felony because it is a "capital crime, perpetrated with felonious mind" which is the definition of a felony in Co. Lit. 391, a. He also holds that it is not accidental but malicious. Also the burning of his house in a street of the city adjoining to the houses of others, is to the endangering of the city, and therefore ought to be construed to be felony; but so

peradventure is not the burning of his house in the fields. And whereas it was said, that the intention here is coupled with an act of burning, and with the intendment of an act which is felony. . . . Also every indictment is *vi et armis et contra pacem,* where an act is done against the commonwealth; so it is where a servant runs away with goods committed to his trust above forty shillings, although it cannot be said to be *vi et armis,* because they were in his custody. And in this case the ill consequence which might have fallen out by this act makes the offense the greater; and the Year Books (cited) put the case of burning houses generally, and not of the burning of other men's houses; and it is an equal mischief in a commonwealth to burn his own in a city or village as to burn the houses of others, for the danger which may ensue.

But *the other three Justices* resolved *ut supra,* that it was not felony; wherefore he was discharged thereof.

But because it was an exorbitant offense, and found, they ordered that he should be fined £500 to the King, and imprisoned during the King's pleasure, and should stand upon the pillory, with a paper upon the head signifying the offense, at Westminster and at Cheapside, upon the market-day, and in the place where he committed the offense, and should be bound with good sureties to his good behaviour during life.

Ency. Brit., 11*th ed., article Arson.*

According to the Malicious Damage Act (Great Britain, 1861) the following crimes are made felonies:

(1) Setting fire to any church, chapel, meeting house or other place of divine worship; (2) Setting fire to a dwelling house, any person being therein; (3) Setting fire to a house, outhouse, manufactory, farm building, etc., with intent to impose and defraud any person; (4) Setting fire to buildings appertaining to any railway, port, dock or harbor; or (5) Setting fire to any public building.

Punishment may be penal servitude for life but less punishments are permitted.

In New York one who wilfully burns property (including a vessel or its cargo) with intent to defraud or prejudice the insurer thereof, though the offense of arson is not committed, is punishable by imprisonment for not more than five years (N. Y. Pen. Code, ss. 575, 578). There must be an intent to destroy the building (*ibid.* s. 490; California Code, s. 447). An agreement to commit arson is conspiracy (*ibid.* s. 171). Killing a person in committing the crime of arson is murder in the first degree (*ibid.* s. 183); this is so in California, even where the crime is merely an attempt to commit arson (Calif. Pen. Code, s. 189). Explosion of a house by gunpowder or dynamite is arson (Texas Pen. Code, art. 761), but a charge of arson by burning will not be sustained by proof of exploding by dynamite, even though part of the building is burnt by the explosion (*Landers* v. *State* (*Tex*), 47 S. W. 1008).

Larceny

(Defined in Penal Law of New York, Article 122, Sec. 1290, Birdseye's Consol. Laws.)

A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person: —

1 Takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing; or secretes, withholds, or appropriates to his own use, or that of any other person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind; or

2 Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement, or by competent authority, to take or hold such possession, custody or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof.

Steals such property, and is guilty of larceny.

Larceny

Bracton, De Legibus, 150 *b.* — Larceny is, according to the law, the fraudulent taking of the property of another, with intent to steal, against the will of the owner.

It has been held[1] that a forester is not guilty of larceny, whatever his offense may be, in cutting down trees on property of which he was the keeper (1338). Wild animals cannot be stolen because they are no man's property until taken, but "peacocks are commonly of the same nature as hens or capons, etc., and the owner has property in them" (1528). Ferrets, though tame and salable, were considered of so base a nature that they could not be the subject of larceny (1818). Pigeons are (1851). A piece of paper, being an unstamped agreement between two parties, was taken by one of them to his own advantage. It was ruled that it could not be the subject of larceny, because it was an agreement of a kind which, if stamped, would have been called a "chose in action" or rather evidence of such a thing. And the court held that, even unstamped, it was essentially the same thing. The common law rule was that "for a chose in action larceny cannot be supported." This is a clear case where theft undeniable is counted not to be larceny for purely technical reasons (1854). Tame partridges, hatched and reared by a common hen were taken

[1] Cf. cases under Larceny, Beale's Cases on Criminal Law, p. 696 ff. Dates are quoted to show the progress of legal decisions.

animo furandi and their taking was held to be larceny, because "from their inability to escape (they were three weeks old and could fly a little) they were practically in the power and dominion of the prosecutor."

In *Mullaby* v. *People,* New York, 1881 (Beale, p. 710) concerning the stealing of a dog, the prisoner's counsel contended that stealing a dog is not larceny. At common law, his contention was just, though dogs were regarded as property. *Erle, J.* says "The common law rule was extremely technical, and can scarcely be said to have had a sound basis to rest on. . . . In the reign of William I it was made grand larceny to steal a chattel valued at twelve pence and upwards, and grand larceny was punishable by death, and one reason hinted at by Lord Coke for holding that it was not larceny to steal dogs was that it was not fit that 'a person should die for them;' and yet those ancient law givers thought it not unfit that a person should die for stealing a tame hawk or falcon. . . . If the common-law rule referred to ever prevailed in this State no doubt it has been changed by legislation. It is provided in 2 R. S. 690, Sec. 1, that every person who shall be convicted of stealing 'the personal property' of another, of the value of $25.00 or under shall be adjudged guilty of petit larceny — personal property is defined to mean 'goods, chattels, effects, evidences of rights of action'[1] and certain written instruments. This definition of personal property is certainly comprehensive enough to include dogs. We think it was

[1] Cf. with the case referred to above in 1854.

intended to be taken literally, and that the law-makers meant to make it the crime of larceny to steal any chattel which had value and was recognized by the law as property."

Larceny of Electricity

Daily Paper — New York, December 11th, 1911.

A jury verdict of $400 was returned yesterday before Judge Finelite in the City Court in favor of Herman Cordes, a confectioner of 524 Columbus Avenue, against Charles O'Connor, an electrician.

The suit was brought to recover for electricity used by O'Connor, who is alleged to have tapped the wire leading from the meter of Cordes in the basement of their adjoining establishments. The verdict was based on the increase in Cordes's electrical bills since 1910. Judge Finelite said that the case was the first of its kind on record.

Comment. This is notable merely as an intelligent appreciation of the fundamental nature of private property; there is no other question involved.

II. LARCENY UNDER PECULIAR CONDITIONS OF FRONTIER LIFE

The codes of such states and territories as Arizona, New Mexico, Texas, Montana and Alaska are especially severe on the theft of animals whose value in

more settled parts of the country would be less great not only in money but in the needs of the people.

In Texas, driving stock to market without a bill of sale, fine not to exceed $2,000. Butchering unmarked animals, fine $50 to $300. Wilfully driving stock from range, confinement in the penitentiary for not less than two or more than five years or fine of not more than one thousand dollars or both. (1886).

In 1858 article 881 of the Texas Penal Code read: "If any person shall steal any horse, ass or mule, he shall be punished by confinement in the penitentiary not less than five nor more than fifteen years." Section 1923 of the Alaska code says: "If any person shall commit the crime of larceny by stealing any horse, gelding, mare, ass, . . . cow, calf, reindeer, such person, upon conviction, shall be punished by imprisonment in the penitentiary not less than one nor more than fifteen years."

Altering marks upon animals is larceny.

Imprisonment one to five years.

Arizona — Grand larceny is committed when any stock animal is stolen. It is punishable by imprisonment for not less than one nor more than ten years.

Driving stock off a range is a felony.

In New Mexico unlawful branding is punished with from one to five years in the penitentiary and a fine of three times the value of the animal.

All cases of larceny and in all cases of felonious taking, stealing, riding, driving away, etc., of any animal or animals is grand larceny and punishable with im-

prisonment of not less than one nor more than ten years even should the value of the animal be less than twenty dollars.

New Mex. Code 1915, sec. 1614, provides that the theft of stock animals be regarded as grand larceny regardless of their value. A penalty of not less than one year nor more than ten years in the penitentiary is imposed.

Judge Crumpacker (in *Wilburn* v. *Territory*, 1900) says: "The object of . . . the act was not to prevent larceny in general, but to protect the ownership of a certain class of property, its title being 'An act for the protection of livestock and other purposes,' and pertaining to no other subject than livestock. We suppose that in the opinion of the Legislature the (earlier) act was needed either to prevent a kind of theft peculiarly easy of commission and difficult of discovery and punishment, or else to afford special protection to the important industry of stockraising, etc."

III. FRAUDS, VICTIMS DECEIVED

Swindling

CLARK *v.* STATE

COURT OF CRIMINAL APPEALS OF TEXAS, 1904

(Reported 81 Southwestern Reporter, 722.)

In a case where there was a conflict between the Penal Code, the general regulations of the municipality of El Paso on the subject of gambling and an express

municipal ordinance punishing bunco games very severely, *Davidson, P. J.* said: "All parties engaged in a gambling transaction, whether under the gaming laws or under the bunco-business ordinance, would be guilty of violating the gaming laws of the state. If the bunco business was carried on in such manner that it was a swindling operation, and for the purpose of getting the money of the bettor by means of loaded dice or other contrivances by which the bettor would not have the ordinary chances in gambling, he would be guilty of theft. . . . He could be punished by imprisonment in the penitentiary if the amount of money obtained was $50 or more, or as a misdemeanor if less than $50."

Insurance Fraud

New York Times, —— 1913.

Louis M....., President of the M..... Company, lace and embroidery importers, of 14 West Twenty-first Street, was sentenced by Justice Gavegan in the Criminal Branch of the Supreme Court to not less than two nor more than three years and six months in Sing Sing Prison for filing a false proof of loss by fire.

M....., who was convicted a week ago, said he had suffered a loss of $145,600 in a fire on April 12th. Investigation disclosed that he had disposed of $60,000 worth of goods before the fire.

Cheating

REGINA *v.* HUDSON

Crown Case Reserved, 1860

(Reported 8 Cox, C. C. 305. Beale, 218 3d ed.)

Charge, conspiracy to cheat. This was a common enough case of trickery, placing an object by sleight of hand in a place different from that where it appeared to go and betting on the result. The prisoner was equally guilty in desiring to cheat the cheaters; but the trial court found the prisoners guilty of conspiracy to cheat by false pretences. *Price,* for the prisoners said: "At the trial the present case was likened to that of *Rex* v. *Barnard,* where a person at Oxford who was not a member of the University, went for the purpose of fraud, wearing a commoner's gown and cap, and obtained goods. This was held a sufficient false pretence. The present case, however, was nothing more than a bet on a question of fact, which the prosecutor might have satisfied himself of by looking at the pencil case. It is more like an ordinary conjuring trick."

Pollock, C. B. " . . . It is not necessary that the words 'false pretences'. . . should be understood in the technical sense contended for by Mr. Price. There is abundant evidence of a conspiracy by the prisoners to cheat the prosecutor, and though one of the ingredients in the case is that the prosecutor himself intended to cheat one of the prisoners, that does not prevent the prisoners from liability to be prosecuted upon this indictment." (Conviction affirmed).

False Pretences

OHIO *v.* HORTON

(Student Report.)

John Horton was paid $65.00 to deliver $3,000.00 in counterfeit money. He did not deliver it. The Supreme Court held that an agreement to deliver counterfeit money to a man was an agreement to deliver "nothing" to him. Therefore, since Horton agreed to deliver "nothing," and in actuality did deliver nothing at all, he could not be prosecuted under false pretences.

Inasmuch as it could not be proved that he ever had in his possession the counterfeit which he agreed to deliver, he was not liable for counterfeiting or for passing bad money.

Comment. This is a very curious instance of the deleterious effect of metaphysics upon the common sense of a court. The "concept of nothing" was never in more flagrant case. The counterfeit money was indeed not legal tender; but it was a commodity in which, unfortunately, there has been considerable traffic. One would not perhaps wish to see the person who trusted him recover. Where both sides to a controversy are criminal, it matters little to society that one of them should get the better of the other, but it would be a little more reassuring to think that our courts were less governed by bad metaphysics than the present instance would indicate.

The finer distinctions between crimes are always made through metaphysical analysis whether the judges are aware of it or not. In this case their subtlety is a little too absurd.

Here no unit of government was threatened by Horton's act. There was no entity to feel offended and act of itself; but the state is threatened by the presence of cheats of any kind.

Daily Paper.

The following advertisement has appeared from time to time in many reputable papers:

"A genuine steel engraving of George Washington will be sent postpaid to any address on receipt of 25 cents. The engraving is perfectly made on first quality paper and is suitable for framing. Address . . ."

When the advertiser opened his first mail after the insertion of the above advertisement, he found that more than $8,000 had been sent in. The people who had made the remittances soon received *one cent stamps* in return for their money.

The advertiser on one occasion was indicted for fraudulent use of the mails. He was *acquitted* because his advertisement had not misrepresented the facts in any way.

IV. APPROPRIATION BY COMPULSION — NOT PHYSICAL

Extortion

REX *v.* SEYMOUR

KING'S BENCH, 1740

(Reported 7 Mod. 382. Beale 49 3d ed.)

Extortion was proven against one Seymour and three justices of the corporation of Colchester in the matter of licenses for public houses. It was their habit to make all foreigners pay ten shillings on pain of having their licenses refused, the usual fee being but one shilling.

Power to issue licenses lay in the hands of the justices. They claimed that the practice of requiring foreigners to pay more for their licenses, though contrary to law, had continued for twenty-five years and that the money was not appropriated by them personally but was devoted to the good of the corporation of Colchester.

The Court held them to have been guilty of a breach of trust and fined them one hundred pounds each. Seymour, the agent of the justices, was fined one hundred and twenty pounds, forty pounds on each information.

Usury

New York Times, 1914.

The Appellate Division (of the Supreme Court) unanimously dismissed Daniel M. T.'s appeal from conviction and sentence to serve six months in the Blackwell's Island Penitentiary, the result of a trial in the Court of Special Sessions.

T. was one of the most widely known salary loan brokers in the world. He had offices in sixty-three American and Canadian cities and formerly had operated abroad. He had not personally participated in the transaction. As is customary in this business, a woman employed in the broker's office conducted all the negotiations with the victim. Women are employed because courts are reluctant to convict them and because to be dunned by a woman is more embarrassing and may lead to domestic complications.

The particular offense was charging $15.00 to repay a loan of $10.00, twelve monthly payments of $1.25 each being required, and a note to make the amount secure.

Blackmail

DEFINITION AND PUNISHMENT

Sec. 856, N. Y. Penal Code

"A person, who knowing the contents thereof, to extort or gain any money or other property, or to do, abet, or procure any illegal or wrongful act, sends, de-

livers, or in any manner, causes to be forwarded or received, or makes and parts with for the purpose that there may be sent or delivered any letter or writing threatening:

1 To accuse any person of a crime; or,

2 To do any injury to any person or to any property; or

3 To publish or continue at publishing any libel; or

4 To expose or impute to any person any deformity or disgrace,

Is punishable by imprisonment for not more than fifteen years."

In *People* v. *Thompson,* 97 N. Y. 313 — The defendant, an attorney, appeared for the complainant on the examination of J., arrested on a warrant issued by a justice of the peace. J. was discharged. Afterwards defendant wrote a letter to C., the father of J., representing that he was a deputy district attorney. The letter purported to come from the district attorney's office. It stated that there was immediate danger of a movement to indict J. and that the writer had power to arrest the matter, that he had talked with the district attorney and had thus far managed to kill the movement — That he would like to make the district attorney a present, and asked C. to send him $75.00, adding: "This will save you and your folks some trouble and expense as well as the stink." There was no complaint whatever before the district attorney against J. Court held that a conviction of blackmailing was warranted.

A conviction was sustained under this section in the case of *People* v. *Triscalli* (1907), 117 App. Div. (N. Y.) 120, where the complaining witness had received two "Black Hand" letters demanding payment of $500 in default of which he and his family would be destroyed. The complainant also testified that the defendant had called upon him and demanded the money in compliance with the letters.

In *People* v. *Wicks* (1906) 112 App. Div. (N. Y.) 39, a conviction was affirmed, where the defendant, an attorney at law, knowing the contents of a letter sent by him to compel the settlement of a civil action, which threatened to accuse the recipient of perjury, had sent it with an intent to extort or gain money.

Sec. 857 of the N. Y. Penal Code provides — "A person, who, under circumstances not amounting to robbery, or an attempt at robbery, with the intent to extort or to gain any money or other property, orally makes such a threat as would be criminal under any of the foregoing sections of this article or under section 551, if made or communicated in writing, is guilty of a misdemeanor."

Sec. 551 provides: "A person, who, knowing the contents thereof, sends, delivers, or in any manner causes to be sent or received any letter or other writing, threatening to do any unlawful injury, to the person or property of another, or any person who shall knowingly send or deliver or shall make and for the purpose of being delivered or sent, shall part with the possession of any letter, postal card or writing, with or

without a name subscribed thereto, or signed with a fictitious name, or with any letter, mark or other designation, with the intent thereby to cause annoyance to any person is guilty of a misdemeanor."

V. BREACHES OF TRUST

Embezzlement

REGINA *v.* BARNES

DEVIZES ASSIZE, 1858

(Reported 8 Cox, C. C. 129. Beale, 3d ed. 742.)

The prisoner was a coal and timber merchant, who fell into difficulties and made an assignment of all his goods, effects and book debts. After his assignment, he received two sums of money, £68 10s. and £29 9s. 7d., which had been debts previously to him and he did not account for the receipt of those sums. After the execution of the deed of assignment the prisoner had been employed by the trustees, at a salary, to conduct the business for the benefit of the trustees.

It was contended by his counsel that this money was his of right — he received his own money. The prosecutors held that immediately on receipt of the money it became the property of the trustees, and then the prisoner was guilty of embezzlement.

The prisoner's counsel gave a definition of embezzlement as the stopping of money *in transitu* to the employer. If rightly received by the prisoner the keeping of it afterwards was not embezzlement.

Byles, J. said, the difficulty was to make out the status of the prisoner before the law. The moment he received those moneys, they were his own moneys — he received what was, in point of law, his own money. How then could he be guilty of embezzlement; or how could he be said to be clerk or servant to the trustees? He could not, in point of law, pass the property in the debts due to him before the deed was executed. His assignees were only equitable assignees; they could only sue in his name. The deed could only pass that which he actually had in his possession at the time the deed was executed.

(The prisoner was therefore *acquitted.*)

Comment. This is a case where the law's ways are mysterious to the layman. If book debts can be assigned by law, it seems very strange that they cannot be collected. It is plain that the prisoner expected to assign such sums and that the trustees expected to receive them. But it seems they were both mistaken.

COMMONWEALTH *v.* HAYS

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1858

(Reported 14 Gray, 62. Beale, 3d ed. 743.)

The indictment was on St. 1857, c. 233, which declares that " if any person, to whom any money, goods, or other property, which may be the subject of larceny, shall have been delivered, shall embezzle or fraudu-

lently convert to his own use, or shall secrete, with intent to embezzle or fraudulently convert to his own use, such money, goods, or property or any part thereof, he shall be deemed by so doing, to have committed the crime of simple larceny."

The facts were that the person accused presented a deposit book to the Charlestown Five Cent Savings Bank, the amount of deposit being One hundred and thirty dollars. He asked for his money and the treasurer paid him by mistake *two* hundred and thirty dollars. When the mistake was discovered, the man was sought and found. He did not deny the facts but maintained the bank would have to *prove* that he had received the excess money.

The court instructed the jury " that if the sum of two hundred and thirty dollars was so delivered to the defendant, as testified, and one hundred dollars, parcel of the same, was so delivered by mistake of the treasurer, as testified, and the defendant knew that it was so delivered by mistake, and knew he was not entitled to it, and afterwards the money so delivered to him by mistake was demanded of him by the treasurer, and the defendant, having such knowledge, did fraudulently, and with a felonious intent to deprive the bank of its money, convert the same to his own use, he would be liable under this indictment."

The jury declared him guilty — but he alleged exceptions and the matter came before the Supreme Court.

Bigelow, J., speaking of the statutes relating to em-

bezzlement, said that they were designed to reach and punish persons who were in a position of confidence toward their employers.

Bankruptcy — Dishonest

PARKER v. GODIN, 1728

(Reported in 2 Strange, 813.)

Ames, Cases on Torts, p. 319.

A bankrupt left some plate in his wife's possession. She, in order to raise money on it, delivered it to her servant who went with the defendant (presumably Godin. G.C.C.) to the door of Mr. Woodward, the banker, and there the defendant took the plate into his hands and went into the shop and pawned it in his own name, gave his own note to repay the money and immediately upon receipt of the money went back to the bankrupt's wife and delivered the money to her. And when suit was brought to recover for the assignees of the bankrupt, the jury found a verdict for the defendant, considering that he had acted only as a friend and that it would be hard to punish him. This verdict was afterwards reversed.

Comment. The significance of the case here is that the bankrupt, through his wife, used valuables which properly belonged to his assignees.

Cf. *Perkins* v. *Smith* (Reported in Ames at the same place) where one Hughes became a bankrupt. The

assignee sued one Smith because he, the servant of Mr. Garraway, to whom the bankrupt was considerably indebted, received goods from him, and sold them for his master's use. The action here concerned the agency of Garraway. It has nothing to do with our interest which is met by the statement of *Lee, C. J.* that "Hughes, the bankrupt, had no right to deliver these goods to Smith."

Stephens and Others v. *Elwall* (quoted from the same place) gives another case of a bankrupt who sold goods which belonged to the assignees.

Comment. In none of these cases were the proceedings directed against the defrauding bankrupt but in all of them he is plainly held to have committed a wrong. Doubtless proceedings were brought against him in each case as well as against the defendants who received goods from him.

Fraudulent Entry

New York Times, Nov. 23, 1913.

After a trial lasting 114 days, Herr Ohm, Managing Director of the Nieder Deutsche Bank, which failed with liabilities of $12,000,000 on July 27, 1910, was sentenced November 22nd to seven years' imprisonment for wrecking the institution by appropriating funds. A public accountant, Herr Hartwig, was at the same time sentenced to three years' imprisonment and a number of other bank employees to terms of from four to six months each.

The bank had been started some years ago on a small capital and Ohm appealed to the poorer classes to make

deposits, spurring them on to do so by the use of religious quotations. Later on the capital was increased until it reached $3,000,000.

The evidence showed that Ohm made fraudulent entries and published false balance sheets to cover up the bank's condition.

VI. ATTACK UPON RIGHTS OF PROPERTY IN PERSONALITY

Libel and Slander

Newell, in the third edition of his work on "Libel and Slander" states in paragraph 25 of Chapter I, "The History of the American Law of Defamation must always be identical with the English law."

Libel and slander is a violation of the individual's right to reputation and Pollock on Torts (7th Ed.) 233 speaks of it in these words: "Reputation and honor are no less precious to good men than bodily safety and freedom. In some cases they may be dearer than life itself. Thus it is needful for the peace and well being of a civilized commonwealth, that the law should protect the reputation as well as the person of the citizen."

F. A. Erwin, in the second edition of his work on Torts, at page 110, defines libel and slander as follows: "When defamation is accomplished by speech or its equivalent, we call it slander; when it is accomplished by writing or its equivalent we call it libel. The former is a civil wrong only; the latter is a criminal as well as a civil wrong."

Statutory definition of Libel — "A malicious publication by writing, printing pictures, effigy, sign or otherwise than by mere speech, which exposes any living person, or the memory of any person deceased to hatred, contempt, ridicule or obloquy, or which causes or tends to cause any person to be shunned or avoided, or which has a tendency to injure any person, corporation or association of persons in his or their business or occupation is a libel." N. Y. Penal Code, Paragraph 242.

In the case of *Sorenson* v. *Balaban*, 11 App. Div. (N. Y.) 164, the plaintiff was the mother of an unmarried, deceased infant in the service of her mother. The defendant was a physician who had attended the deceased infant in her last illness. The action was brought on two causes of action. The first charged the defendant with mal-practice, as the result of which plaintiff's daughter died. The second cause of action charged that after the death of plaintiff's daughter "The defendant maligned her memory by repeating to the plaintiff and to divers other persons, a false, untrue and malicious charge that the said Clara had been pregnant and had had a miscarriage." The court states at page 167 — "The only redress for slander is a civil action. A libel however, both at common law and under our statute is a crime and for it the offender may be prosecuted civilly or criminally also; both at common law and by the Penal Code (242) a libel upon the memory of the dead is punishable as a crime . . . The objection that there could not be a proper plaintiff

in a civil action for a libel on a deceased person would seem equally applicable to an action for slander. We are therefore of the opinion that such an action (i.e. a civil action for maligning the memory of the dead) will not lie."

In the case of *Colby* v. *Reynolds* (6 V. 489 at page 493) the court distinguishes between libel and slander as follows — "A distinction has long been known and recognized between verbal and written slander. Words, when committed to writing and published are considered as libelous which if only spoken would not subject the person speaking to any action. Perhaps it is to be regretted that a distinction was ever made between oral and written slander, and if it was a new question, no distinction would now be made. The reasons which have been given for the distinction, have been questioned both by writers and judges of eminence. It has been made, however, and has become part of the law, and as such we must receive it. There can be no question that a slander written and published, evinces a more deliberate intention to injure, is calculated more extensively to circulate the accusation, and to provoke the person accused, to take the means of redress into his own hands and thus to commit a breach of the peace, than mere oral slander which is spoken and soon forgotten."

The imputation of unchastity is actionable *per se* by statute. Imputing unchastity to a women was not actionable at common law unless special damage was alleged and proved; but today in New York State, " In

an action of slander brought by a woman for words imputing unchastity to her it is not necessary to allege or prove special damage." N. Y. Code of Civil Proc., paragraph 1906.

In the case of *Finch* v. *Uifguain,* 11 Neb. 280, the plaintiff occupied the position of grand worthy chief templar in a temperance organization and also that of secretary of the State Temperance Alliance and was constantly engaged in the duties connected therewith. The defendants, as the petition alleged, falsely and maliciously published of him that he was a " seducer of innocent girls " and instanced an attempt on his part to debauch and ruin a young school girl, who was at the time a member of his own household. Also that he was " an arch hypocrite and scoundrel who was simply using his talents for money making purposes and not through any sincerity in the cause in which he was laboring." The court held that each of these charges was actionable *per se,* and without proof of special damage.

In the case of *Young* v. *Kuhn,* 71 Tex. 131 — The court held that a charge that a butcher slaughters and sells diseased and unwholesome meat is actionable *per se.*

In the case of *Toye* v. *McMahon,* 21 La. Ann. 308, the court held that charging a white man with being a negro under the existing social habits and prejudices of that state was calculated to inflict injury and damage and the charge was recognized as slander actionable *per se* under the constitution of Louisiana

of 1868 although the common law distinction between words actionable *per se* and words not actionable *per se,* did not exist, because Louisiana followed the civil law of France.

In the Northern States very few cases have been reported where a charge that a white man is a negro has been held to be slanderous *per se.* On the other hand most of the Southern States so hold as in the case of *Eden* v. *Legare,* 1 Bay (S. C.). The calling a person a mulatto, thereby imputing a lack of civil rights enjoyed by the whites was held slanderous *per se.*

In the state of Massachusetts an action will lie for calling a woman a drunkard, it having been so decided by the court in the case of *Brown* v. *Nickerson,* 5 Gray (Mass.) 1.

In the case of *Franklin* v. *Browne,* 67 Ga. 272, the court held that words charging that a minister of the gospel collected money for a particular purpose and embezzled it for his own wrongful use and that he was unfit to be a minister, is actionable without proof of special damage.

In the early English case of *Ogden* v. *Turner,* 6 Mod. 104, Holt, 40, 2 Salk. 696, the defendant said to the plaintiff, " Thou art one of those that stole my Lord Shaftsbury's deer." The court held, " That words to be themselves actionable without regard to the person or foreign help must either endanger the party's life or subject him to infamous punishment, and that it is not sufficient that the party may be fined and imprisoned; and yet that no one will assert that to say

one has committed a trespass will bear an action, or that at least the thing charged upon the plaintiff must be scandalous."

In the leading case in U. S. of *Brooker* v. *Coffin,* 5 Johns (N. Y.) 188, the following is given as the test of words actionable *per se:* "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable."

In the case of *Truth Pub. Co.* v. *Reed,* 13 Ky. L. Rep. 323, it was held that to publish in a newspaper that a member of the board of equalization would reduce the taxes of anybody who would render him certain political favors was libelous.

In case of *Larrabee* v. *Minn. Pub. Co.,* 36 Minn., 141, it was held that a publication charging a county attorney with culpable neglect of his official duty in failing to prosecute — "purely out of political fear" — a certain person suspected of having committed a criminal offense, was actionable, because neglect, from such a motive must be a gross offense for which he might be removed from office.

In the English case of *How* v. *Prin.,* Holt 652, 2 Salk 694, Lord Holt states: "It has been adjudged that to call a justice of the peace blockhead, ass, etc., is not a slander for which an action lies because he was not accused of any corruption in his employment or any ill design or principle; and it was not his fault that he was a blockhead, for he cannot be otherwise

than his Maker made him; but if he had been a wise man and wicked principles were charged upon him, when he had not them, an action would have lain; though a man cannot be wiser, he may be honester than he is." [1]

Truth is a complete defence in a civil action. In case of *Joannes* v. *Jennings*, 6 T. & C., 138 at page 141, the court states: "In civil actions where the truth of the alleged libel is pleaded in justification, it may be proved as a complete bar to the suit; and in such case the motives with which the publication was made are not material. . . . Our laws allow a man to speak the truth although it be done maliciously."

A *better* rule applies in criminal actions as it is stated in the N. Y. Penal Code, Par. 244, which is as follows:

In criminal actions for libel, "The publication is justified, when the matter charged as libelous, is true and was published with good motives and for justifiable ends. The publication is excused when it is honestly made, in the belief of its truth and upon reasonable grounds for this belief, and consists of fair comments upon the conduct of a person in respect of public affairs or upon a thing which the proprietor thereof offers or explains to the public."

Comment. It will be noted from the foregoing that even though the writing complained of be true, in the case of a criminal libel it must have been published with good motives and without malice, for truth to prevail as a defence.

[1] One may question the wisdom of the author of this sage remark, however one may respect his integrity!

Bigamy

REGINA *v.* TOLSON

CROWN CASE RESERVED, 1889

(Reported 23 Q. B. Div., 168. Beale, 236 3d ed.)

Wills, J. In this case the prisoner was convicted of bigamy. She married a second time within seven years of the time when she last knew of her husband being alive, but upon information of his death which the jury found that she upon reasonable grounds believed to be true. A few months after the second marriage he re-appeared.

The statute upon which the indictment was framed is in these words: "Whoever, being married, shall marry any other person during the life of the former husband or wife shall be guilty of felony, punishable with penal servitude for not more than seven years, or imprisonment with or without hard labor for not more than two years," with a proviso that "nothing in this act shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years last past, and shall not have been known by such person to be living within that time." (The rest of the opinion, which is very long, has been greatly condensed. G.C.C.)

It is a principle of English law that ordinarily speaking a crime is not committed if the mind of the person

doing the act in question be innocent. But although this is the general rule it is not inflexible. Much municipal law today must be obeyed whether there is a guilty mind of not. The acts are properly construed as imposing the penalty when the act is done, no matter how innocently. If a man fails to observe the statutory provision it is at his own peril. Yet even in such cases, the nature of the offense will be all important.

In the present case one consequence of holding that the offense is complete if the husband or wife is *de facto* alive at the time of the second marriage — would be that though the evidence of death should be sufficient to induce the Court of Probate to grant probate of the will, etc., the wife of the person supposed to be dead who had married six years and eleven months after the last time she had known him to be alive would be guilty of felony in case he should turn up twenty years afterwards. Any construction of a statute is justifiable which will avoid such monstrous consequences.

The intention of the legislature cannot be decided upon simple prohibitory words without reference to other considerations.

Stephen, J., said that in every case knowledge of fact is to some extent an element of criminality as much as competent age and sanity. An alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offense.

Wills, Stephen and other JJ. were of opinion that the conviction should be quashed. Manisty, J. and others voted for affirmation. The conviction was quashed.

Comment. Points — no crime is committed if the mind of the person doing the act is innocent; but this is affected by statutes which are mandatory. *Still* we must take account of facts, (Stephen, J.) and of absurdities which strict construction would entail.

VII. RIGHTS AS BETWEEN TWO PARTIES

Ownership of Aerolite

GODDARD *v.* WINCHELL, 1892

86 Iowa, 71

(Milburn's Curious Cases, p. 41 ff.)

An aerolite fell upon land owned by the plaintiff (Goddard) on May 2, 1890. The day after it was dug out by Peter Hoagland in the presence of Elickson, tenant of the grass privilege at the time. Hoagland claimed it because it was treasure trove. On May 5th he sold it to the defendant Winchell for One Hundred and Five Dollars. Goddard claimed it and the "district court found that the aerolite became a part of the soil on which it fell."

On appeal the language of Blackstone was cited: "Occupancy is the taking possession of those things

which before belonged to nobody" and "whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor, and as such are returned into the common stock and mass of things, and therefore they belong as in a state of nature, to the first occupant or finder."

The judge of the appellate court decided that such reason did not apply. The aerolite was one of nature's deposits and it was in a very real sense "immovable." "Except for the peculiar manner in which it came, its relation to the soil would be beyond dispute." It was "never lost nor abandoned."

He further said that his "conclusions were announced with some doubts as to their correctness but they arise not so much from the application of known rules of law to proper facts as from the absence of defined rules for these particular cases."

Judgment for the plaintiff affirmed.

Lien

HANNA *v.* PHELPS

SUPREME COURT OF JUDICATURE OF INDIANA, 1855

(7 Ind. 21.)

Phelps, the plaintiff in the original case (who won it), delivered to Hanna and Burr, engaged in the business of rendering lard from hogs' heads by steam and

barrelling the lard so rendered for hire, three thousand hogs' heads to be rendered and returned to him for a reasonable compensation. Hanna and Burr returned a part of the lard so rendered but retained in their possession over 3000 pounds, claiming that Phelps was indebted to them $200 for rendering lard and that this amount exceeded their indebtedness to him. They declined to deliver any more lard. This amounted to a conversion, that is the forcible taking possession of property which did not belong to them. They had an action at law for the debt due them. They could sue for payment; but they forcibly withheld the lard which they had agreed to make and deliver for a price. The question here is whether they had a lien on the lard. The court held that they had not. "An unqualified refusal, upon a demand duly made, is evidence of a conversion; because it involves a denial of any title whatever in the person who makes the demand. In the case before us the defendants declined to deliver any more lard. This was, in effect, an assumption that they had in their possession no more belonging to the plaintiff."

Judgment affirmed for Phelps.

NAYLOR *v.* MANGLES, 1794

(Reported 1 Esp., 109.)

Lord Kenyon said, liens were either by common law, usage or agreement. Liens by common law were given where a party was obliged by law to receive goods,

etc., in which case, as the law imposed the burden, it also gave him the power of retaining, for his indemnity. This was the case of innkeepers, who by law had such a lien. That a lien from usage was a matter of evidence. The usage in the present case had been proved so often, he said, that it should be considered as a settled point that wharfingers had the lien contended for.

BEVAN *v.* WATERS, 1828

(Reported Mood. and M., 235.)

The question in the cause was whether the defendant was liable to the plaintiff for the training of a race horse, which the defendant had bought of a third person, whilst in the plaintiff's possession, and which had been given up to the defendant under an agreement, as was contended, to pay for the training, in consideration of the plaintiff's lien. The defendant contended that there was no lien.

Best, C. J., held that in this case, on the principle of the common law, where the bailee expends labor and skill in the improvement of the subject delivered to him, he has a lien for his charge. I think that the trainer has a lien for the expense and skill bestowed in bringing the horse into condition to run at races.

Verdict for the plaintiff.

JUDSON *v.* ETHERIDGE, 1833

(Reported 1 Cr. & M., 743.)

A horse was delivered by the plaintiff to the defendant to be stabled and taken care of, and fed and kept by the defendant for the plaintiff, for remuneration and reward. The plaintiff became indebted to the defendant in the sum of £10 for care of the horse, and the defendant detained the horse until the sum should be paid.

"The question is, whether, on the state of facts disclosed the defendant has or has not a lien upon the horse. I am of opinion that he has no lien. The present case is distinguishable from the cases of workmen and artificers, and persons carrying on a particular trade, who have been held to have a lien, by virtue of labor performed in the course of their trade, upon chattels bailed to them. The decisions on the subject seem to be all one way."

Lord Chief Justice Best expressly draws the distinction between a trainer, who bestows his skill and labor, and a livery stable keeper; between horses taken in by a trainer and altered in their value by the application of his skill and labor, and horses standing at livery without such alteration.

Judgment for the plaintiff.

CALDWELL *v.* TUTT, 1882

Tennessee

(Reported 10 Lea, 258.)

Plaintiffs are livery stable keepers in the city of Clarksville. Mr. Mumford had placed his horse in the stable to be kept by the owners of the stable. He was in the habit of taking the horse from the stable occasionally for a ride, by and with the consent of the keepers of the stable. While riding him on one of these occasions, the horse was levied on by defendant, a constable, by virtue of an execution against the owner.

Had the livery stable keeper whose bill for board of the horse was unpaid, a lien on the horse for its payment, or was the execution levy superior to it?

The circuit judge decided in favor of the defendant. Appeal to the Supreme Court.

Freeman, J., said, the case turns mainly on sections 1993a and 1993e of the Code. The first provides: "Whenever any horse or other animal is received to pasture for a consideration, the former (i.e. the person caring for it) shall have a lien upon the animal for his proper charges, the same as the innkeeper's lien at common law." The latter section is: "Livery-stable keepers shall be entitled to the same lien provided for in Section 1 of this act, on all stock received by them for board and feed, until all reasonable charges are paid."

The right of the innkeeper is to detain or hold the horse till the price of his provender be paid. (3 Parsons, 249). Mr. Parsons adds: "What shows the spirit and principle of the rule, if he permit his guest or horse to depart on credit, he loses his lien, and can never arrest it after for that debt if the guest come again."

Apply this rule and the sections of the Code to the circumstances of this case.

The innkeeper permitted the owner to take his horse out to ride. It cannot be maintained that he thereby intended to permit the party to depart with the horse — it was well understood that the possession would be in a short time restored. Neither party thought of terminating the contract, so as to release thereby the lien of the livery-man.

The livery stable keeper would retain his lien against Mumford; and Mumford's creditor, who caused the execution to be made, can have no higher rights than Mumford himself. His claim is subject to the livery-man's lien.

JACKSON *v.* CUMMINS

1838, England

(Reported 5 M. & W., 342.)

Trespass for breaking and entering an outhouse and premises belonging to the plaintiff, and seizing and driving away ten cows, the property of the plaintiff,

and converting and disposing of the same to the defendant's own use, etc.

It was contended by the defendants that two of said cows for the space of eight months had been pastured and fed by the defendant Charles Cummins for the plaintiff at the plaintiff's request, and for reward and remuneration. There was and still is due and owing to Cummins the sum of £16 5s., for this care. It was further agreed that Cummins was to keep the cows so long as this sum remained unpaid. These two cows were in Cummins' possession until the plaintiff fraudulently, unlawfully and wrongfully took them away whilst Cummins had a lien upon them. Cummins maintained that he peacefully and lawfully regained his own property. He pleaded not guilty as to the other cattle.

The court of first instance found for the plaintiff, the jury declaring that no such agreement existed between plaintiff and defendant. On appeal before *Parke, B.*, the question of lien was discussed very fully. He said: "I think by the general law no lien exists in the case of agistment. The general rule is, that by the general law, in the absence of any special agreement, whenever a party has expended labor and skill in the improvement of a chattel bailed to him, he has a lien upon it." And he did not find that one who simply took animals to pasture had done anything to improve them. The verdict was confirmed to the plaintiff.[1]

[1] For a full discussion of the agistor's lien cf. "Cases on Property" *Gray*, Vol. 1, p. 162, Editor's Note. "The agistor has a lien

BROADWOOD *v.* GRANARA

Exchequer, 1854

(Reported 10 Exch., 417.)

In March, 1853, a Monsieur Hababier, a foreigner and professional pianist, went to reside at the hotel of the defendant, Hotel l'Europe, Leicester Square. On the 28th of that month he went to the manufactory of the plaintiffs, Messrs. Broadwood, and requested the use of a pianoforte. It is usual to lend pianofortes to professional musicians free of charge. One was sent him, later taken away and replaced by another. It was understood by the proprietors of the hotel that the piano was not the property of Monsieur Hababier. (He claimed it was.)

It was admitted, for the purposes of this case, that the hotel of the defendant was and is an inn; and that

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by the Scotch law and in many jurisdictions, a lien is given by statute to agistors and stable-keepers."

Cf. also *Steinman* v. *Wilkins,* Pennsylvania, 1844 (Reported 7 W. & S. 466) where *Gibson, C. J.* says, "It is difficult to find an argument for the position that a man who fits an ox for the shambles, by fattening it with his provender, does not increase its intrinsic value by means exclusively within his control," also "The truth is, the modern decisions evince a struggle of the judicial mind to escape from the narrow confines of the earlier precedents, but without having as yet established principles adapted to the current transactions and convenience of the world . . . Lord Ellenborough, alluding to the old decisions, said that if they 'are not supported by law and reason, the convenience of mankind certainly requires that our decisions should not be governed by them' and Chief Justice Best declared that the doctrine of lien is so just between debtor and creditor that it cannot be too much favored."

the defendant was and is entitled to the rights of an innkeeper.

Pollock, C. B. We are all of opinion that the lien claimed by the defendant cannot prevail . . . there is no case which decides that an innkeeper has a right of lien under such circumstances as these. This is a case of goods, not brought to the inn by a traveler *as his goods* either upon his coming to or whilst staying at the inn, but they are goods furnished for his temporary use by a third person, and known by the innkeeper to belong to that person.

Platt, B. The case of *Johnson* v. *Hill* shows the principle of law which is applicable to the present case. If a person brings the horse of another to an inn, the innkeeper may detain it from the owner until its keep is paid. But if the innkeeper knew that the person bringing the horse illegally got possession of it, and therefore had no right to pledge it for his debt, then the lien does not attach.

Judgment for the plaintiffs.

THREEFALL *v.* BORWICK[1]

Queen's Bench, 1872

(Reported L. R. 7 Q. B., 711.)

One Butcher lodged at the Ferry Hotel on Lake Windermere, with his wife and sister, bringing with him a pianoforte which defendant thought was

[1] Cf. also *Robins and Co.* v. *Gray,* Queens Bench Division, 1895. Reported 2 Q. B., 501.

Butcher's own but which in reality was the property of the plaintiff from whom he had hired it. After several weeks Butcher left the hotel owing £45; and, on demand of the plaintiff, defendant claimed to detain the piano in exercise of his lien as innkeeper for the debt due by Butcher.

It was objected by counsel for the plaintiffs that pianos were not such personal goods as were commonly brought to inns by travelers. The court overruled this . . . "Whether the defendant was bound to receive the piano or not, he did receive it as the goods of the guest, and so must become liable for it, and therefore must be entitled to his lien.

Verdict for defendant — the innkeeper.

Lord Esher, M. R., "The duties, liabilities and rights of innkeepers with respect to goods brought to inns by guests are founded, not upon bailment, or pledge, or contract but upon the custom of the realm with regard to innkeepers. Their rights and liabilities are dependent upon that, and that alone; they do not come under any other head of law. What is the liability of an innkeeper in this respect? If a traveler comes to an inn with goods which are his luggage — I do not say his personal luggage but his luggage — the innkeeper by the law of the land is bound to take him and his luggage in. The innkeeper cannot discriminate and say that he will take in the traveler but not his luggage. . . . He has not to inquire whether the goods are the property of the person who brings them or of some other person."

New York Times (*Probably Nov.*) 1913.

The clause printed on its passenger tickets and baggage checks by the New York, New Haven & Hartford Railroad, limiting its baggage liability in case of loss to $150 in New York State, and $100 in Massachusetts unless the owner declares a higher value and pays a premium, was upheld by the Appellate Division yesterday in a suit brought by Mrs. Katherine B. against the road. Mrs. B. sued for $1,300 as the value of a lost trunk and its contents checked on a passenger ticket from Gardner, Mass., to this city. She said she had not noticed the clause limiting baggage liability and that no one had called her attention to it. She refused therefore to be bound by it.

The Appellate Division, by a divided vote, Justice Scott dissenting, held that Mrs. B. could collect only $100 for the loss of her trunk.

Trespass

RACE *v.* WARD

Queen's Bench, 1855

(Reported 4 E. & B., 702. Gray II, p. 10.)

The defendants in this case broke and entered the plaintiff's close in the township of Horsley, justifying themselves under an immemorial custom in that township for all the inhabitants for the time being to have the liberty and privilege to take water from a certain well or spring and to use it for domestic purposes.

The trespass was acknowledged but justified by the defendants.

Lord Campbell said, among other things, in his opinion, that "the water which they claim a right to take is not the produce of the plaintiff's close; it is not his property; it is not the subject of property. Blackstone, following other elementary writers, classes water with the elements of light and air."

It was held that water in a spring or well could be taken under immemorial custom, though, had it been in a cistern, there would have been no such right.

Judgment for the defendants.

HIGGINSON *v.* YORK

5 Mass. 341

(Supreme Judicial Court of Massachusetts, 1809. Ames, p. 84.)

In the year 1805 the defendant, the master of a vessel employed in the coasting trade, was employed by one Kenniston, a trader, to take a cargo of wood from Burnt Island to Boston. The defendant went to the island with Kenniston, took on board thirty or forty cords of wood, carried it to Boston, where it was sold, and gave the proceeds to Kenniston. One Phinney, without right or authority had cut the wood in question, and had sold it to Kenniston, previously to the agreement between the defendant and Kenniston.

There was no evidence that the defendant had any knowledge of the trespass committed by Phinney, or that he was in any manner concerned, or aiding or assisting therein, other than by going to the island and taking the wood upon freight.

The court observed that the defendant was plainly a trespasser in going, without the license of the owner, upon the land of the plaintiffs.

Phinney acquired no property in the wood by cutting it, as against the owners of the soil; Kenniston could acquire none from him and could transfer none to the present defendant.

Verdict for the plaintiff.

BULLOCK *v.* BABCOCK

Supreme Court of Judicature, New York, 1829

(3 Wendell, 391. Ames, 76.)

In 1816 the defendant, then being about twelve years of age, accidentally shot a schoolmate in the eye with an arrow. The shooting was accidental although the arrow was aimed at him in playfulness. There had been no quarrel between the boys but the plaintiff had been afraid that he would be shot. The shot destroyed one eye and affected the sight of the other. His family was poor and he was unable to receive an education.

Suit for damages was commenced in 1827, within

a year after the plaintiff became of age. The judge of the trial court charged the jury that shooting the arrow in the schoolroom where there were a number of boys assembled was an unlawful act; that it appeared to him to have been, at the least, grossly negligent and unjustifiable; and that if the jury thought so, they ought to find a verdict for the plaintiff with damages. They accordingly gave damages in the sum of $180.00.

A motion was made to set aside the verdict. This was denied by *Marcy, J.*, who said: "It is not, I apprehend, necessary for us to say whether the judge erred or not in his remark to the jury that, etc." for, if the act in itself was lawful, and there was not a proper care to guard against consequences injurious to others, the actor must be held responsible for such consequences.

In ordinary cases, if the injury is not the effect of an unavoidable accident, the person by whom it is inflicted is liable to respond in damages to the sufferer. Where, in shooting at butts, the archer's arrow glanced and struck another, it was holden to be a trespass. So where a number of persons were lawfully exercising themselves at arms, one, whose gun accidentally went off, was held liable in trespass for the injury occasioned by the accident. Where, in a dark night, the defendant got on the wrong side of the road, and an injury ensued to the person of the plaintiff, trespass for the damage was sustained. *If the accident happen entirely without the fault of the defendant, or any blame being*

imputable to him, an action will not lie. (Italics mine. — G.C.C.) (*Wakeman* v. *Robinson.*) In that case, the blame imputable to the defendant was, that, his horse being young and spirited, he used him without a curb rein; and that he ought to have continued on a straight course.

Unless a rule is to be applied to this case different from that applicable to a transaction between adults, the proof was most abundant to charge the defendant with the consequences of the injury. Infants, in the same manner as adults, are liable for trespass, slander, assault, etc. Where infants are the actors, that might probably be considered an unavoidable accident which would not be so considered where the actors are adults; but such a distinction, if it exists, does not apply to this case. *The liability to answer in damages for trespass does not depend upon the mind or capacity of the actors; for idiots and lunatics are responsible in the action of trespass for injuries inflicted by them.*[1]

In *Brown* v. *Kendall* (Ames, p. 79) the remark is made by *Shaw, C. J.* that "to make an accident or casualty, or, as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed."

[1] Note that there can be no criminal charge where the injury is unintentional. (Italics mine.)

Caveat Emptor — Let the Buyer Beware

WARREN *v.* BUCK

VERMONT REPORTS, OCTOBER TERM, 1898

The defendant, a farmer, sold the plaintiff, a butcher, seven hogs on inspection, at the full market price per pound, live weight, knowing that they were to be cut up and sold. Two of the hogs had tuberculosis, a latent defect which destroyed their food value.

The court held to the rule, *caveat emptor* (the buyer's risk) and dismissed the complaint.

Comment. The rule *caveat emptor* has been greatly modified by statute and it may be said that the present day practice holds that deceit is fraud in most cases whether there have been any formal representations or not.

In *Saltus* v. *Everett,* 20 Wend. 267, 275, it is said: "The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his consent, and consequently that even the honest purchaser under a defective title cannot hold against the true proprietor."

Fletcher, J., from whom the above is quoted, giving judgment in the case of *Robinson* v. *Baker,* (cf. Gray I, p. 183, [1849]) said: "Upon this settled and universal principle . . . the books are full of cases, many of them hard and distressing cases, where honest and innocent persons have purchased goods of others ap-

parently the owners, and often with strong evidence of ownership, but who yet were not the owners, and the purchasers have been obliged to surrender the goods to the true owners, though wholly without remedy for the money paid. . . . These are hazards to which persons in business are continually exposed by the operation of this universal principle, that a man's property cannot be taken from him without his consent."

Comment. Here the principle of *caveat emptor* still holds and statutes are, so far as I know, powerless to remedy such cases. Business men now protect themselves in the transfer of real estate by having the titles guaranteed or insured, for a fee, by companies having large capital, who make this their business. Of course criminal action may be brought against the offenders but the property lies in the legal owner and no other.

Eminent Domain

GARRISON *v.* THE CITY OF NEW YORK

88 U. S. 196

The New York legislature in 1869 passed an act providing for the widening and straightening of Broadway in New York City, and for the purchase by condemnation of all property necessary to the carrying out of the project. Under this act the measures authorized were taken and various awards were made by three commissioners of estimate — among others

one of $40,000 to one Garrison as his damages for taking a portion of leasehold estate held by him.

The case in question has no further bearing upon eminent domain but is wholly devoted to the right of the legislature of New York to pass an act providing for the review of these awards in case unfairness or fraud should be discovered. The case referred to interferes with contract rights but was decided adversely to this contention.

Contract

FLETCHER *v.* PECK

6 CRANCH 87, 1810

This case concerned lands sold to one John Peck of Georgia under an act of the legislature authorizing such sale. It was afterwards claimed that the State of Georgia had no authority to dispose of such lands as they really belonged to the United States as heir of the British Crown. With the ramifications of the case in the matter of various deeds and authorities, we have no concern here. There was a charge also that certain members of the legislature were induced to vote for the act enabling the land to be sold, on the promise that they should share in the proceeds.

The case finally came to the Supreme Court of the United States and Chief Justice Marshall delivered the opinion.

The Chief Justice, while deploring the contamination of the sources of legislation in an infant republic, remarks " How far a court of justice would be competent, on proceedings instituted by the state itself,[1] to vacate a contract thus formed, and to annul rights acquired, under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice."

The legislature of Georgia was a party to this transaction " If (it) was not bound to submit its pretensions to those tribunals which are established for the security of property, and to decide on human rights, if it might claim for itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded."

The legislature of Georgia, like a private person, cannot disregard the rules of equity. If this sale was brought about by fraud, nevertheless there were innocent third parties to whom conveyance was made, whose property rights must be protected. " In this case the legislature may have had ample proof that the original grant was obtained by practises which can

[1] Not the case here.

never be too much reprobated, and which would have justified its abrogation so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee simple to the grantee, clothed with all the solemnities which law can bestow."

It was claimed that one legislature was competent to repeal the acts of its predecessor without doubt; but, if an act be done under a law, a succeeding legislature cannot undo it. "When a law is in its nature a contract, when absolute rights have rested under that contract, a repeal of the law cannot devest those rights."

"A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right."

"It is then the unanimous opinion of the court, that, in this case the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

The judgment of the lower court was affirmed, with costs; thus establishing the validity of the contract.

Nuisance

BAMFORD *v.* TURNLEY

EXCHEQUER CHAMBER, 1862

(Reported 3 B. & S., 62.)

This was a case where damages were claimed because of a nuisance which was injuring the property of the plaintiff.

It appeared on the trial in 1860 that certain lands in Norwood were offered for sale in lots at public auction in accordance with certain printed particulars and conditions of sale. One of the statements was as follows: "There is abundance of brick earth and gravel, which . . . present an unusually advantageous opportunity of carrying out safe and profitable building operations."

One Captain Strode bought one of the lots, built a house upon it, and leased it to the plaintiff in this case. Shortly after, the defendant bought several lots. In 1860 he, having in mind to use some of the clay in building, erected what is called a "clamp of bricks" as far away as possible from the plaintiff's house. Bricks had previously been burned on many lots in the neighborhood even on the site of the plaintiff's house. The defendant had endeavored to make the necessary burning of bricks as little offensive as possible.

The Lord Chief Justice directed the jury that, "if they thought the spot was convenient and proper, and

the burning of the bricks was, under the circumstances, a reasonable use by the defendant of his own land," the defendant would be entitled to a verdict — which was accordingly given.

The plaintiff appealed.

Williams, J., delivered the opinion. He said that the judgment was plainly based upon a passage in Comyn's Digest upon the Case for a Nuisance. "So an action does not lie for a reasonable use of my right, though it be to the annoyance of another; as if a butcher, brewer, etc., use his trade in a convenient place, though it be to the annoyance of his neighbor," but *Hide, C. J.*, has said, "a tan house is necessary, for all men wear shoes, and nevertheless it may be pulled down if it be erected to the nuisance of another." As the use of an offensive trade will be indictable if it be carried on in an inconvenient place, i.e., a place where it incommodes a multitude of persons, so it will be actionable if it be carried on in an inconvenient place, i.e., a place where it greatly incommodes an individual. The question is, what is inconvenient? In arguing for the plaintiff Mr. Mellish pointed out that if such a doctrine as that of convenience be carried out "it must be maintained to the extent that, however ruinous may be the amount of nuisance caused to a neighbor's property by carrying on an offensive trade, he is without redress if a jury shall deem it right to find that the place where the trade is carried on is a proper and convenient place for the purpose."

Bramwell, B., said, agreeing with *Williams, J.*, that

the judgment should be reversed. The defendant had infringed the maxim, "*So use thine own as not to injure what is another's.*" The instances put during the argument, of burning weeds, emptying cesspools, making noises during repairs, and other instances which would be nuisances if done wantonly or maliciously, nevertheless may be lawfully done. Such cases are not extreme. There must, then, be some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and in this, viz., that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action. The present case does not come under this principle. The fact that the nuisance was temporary makes no difference. It is too hard to establish what is temporary.

Nor can it be claimed that a thing is lawful if for the public benefit unless it can be clearly shown on the balance of loss and gain to all. No one thinks it would be right to take an individual's land without compensation to make a railway. It is for the public benefit that there should be railways but it would not be unless the gain of having the railway was sufficient to compensate the loss of land required for its site.

If we look to analogous cases I find nothing to countenance the defendant's contention. A riparian owner cannot take water for the public benefit; he cannot foul it for the public benefit, if to the prejudice

of another owner. A common cannot be enclosed on such principle. A window, the fee simple of which is 5s., cannot be stopped up by a building worth £1,000,000, of the greatest public benefit.[1]

This nuisance was not a case of necessity.[2]

Verdict for the plaintiff.

Comment. This is, as are all trespass cases, a question of relative rights to property. The English law as here recorded seems to be very strict to protect the least thing whose property *character* is established; yet the maxim is the same for England and America. "So use thine own as not to injure what is another's." The whole difficulty lies in its application; and the principle of eminent domain would seem to indicate that the English law would yield if once the public interest grew sufficiently strong, whatever the prescriptive right of the individual might be. An examination of practice in England during the recent war would doubtless support my contention, but there is no access to such records under present conditions.

[1] There is a difference in principle between English and American decisions on this point. Light and air are held to become private property by easement in England. In America this principle has been denied. Cf. Ely, *op cit.*, p. 113.

[2] This case has been greatly abridged.

ST. HELEN'S SMELTING CO. *v.* TIPPING

House of Lords, 1865

(Reported 11 H. L. C., 642.)

This was an action brought by the plaintiff, Tipping, to recover damages for injuries done to his trees and crops by their works. The damage was done by noxious gases, vapors, etc., which were diffused over the lands of the plaintiff. The plaintiff acknowledged having seen the large chimney of the factory before he purchased his land but he said that he did not know the works were in operation. It was shown by the defense that the whole neighborhood was studded with chimneys and that it was impossible to say which works produced the injury complained of.

The judge told the jury (Mr. Justice Mellor at Liverpool) that "an actionable injury was one producing sensible discomfort; that every man, unless enjoying rights obtained by prescription or agreement, was bound to use his property in such a manner as not to injure the property of his neighbors; that there was no prescriptive right in this case; that the law did not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; and therefore, in an action for nuisance to property, arising from noxious vapors, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. That when the

jurors come to consider the facts, all the circumstances, including those of time and locality, ought to be taken into consideration; and that with respect to the latter it was clear that in countries where great works had been erected and carried on, persons must not stand on their extreme rights and bring actions in respect of every matter of annoyance, for if so, the business of the whole country would be seriously interfered with." The jury found that while the defendants' business was a proper one and conducted in a proper manner it nevertheless damaged the plaintiffs and was not carried on in a proper place. They found for the plaintiff in the sum of £361 18s. 4½d. Appeal was taken to the Exchequer Chamber and judgment affirmed. Appeal was then taken to the House of Lords, which again affirmed the judgment on the ground that the property destroyed was very valuable and that there was no excuse for the offensive vapors and other harmful effects produced by the works in question.

Comment. The last sentence in this case is sufficient comment on it. The damage done was very great and *unnecessary.*

GILBERT *v.* SHOWERMAN

Supreme Court of Michigan, 1871

(Reported 23 Mich., 448.)

This was a suit to enjoin the operation of a flour mill. The plaintiff had owned and lived in a building

for more than twenty years. The lower floor was rented as a store or warehouse, the upper part as a dwelling by the owner. Adjoining his building was one in which had been set up machinery and fixtures to run a flour mill and such a mill was being run. The plaintiff maintained that it was a nuisance in that it shook his house, weakened its walls, rattled the windows and dishes in his home, made much extra soot and dirt and many unpleasant noises, etc.

The evidence showed that the two buildings were part of a long continuous block in the city of Detroit, all the buildings of which appeared to have been constructed for business purposes. There have been numerous families occupying parts of houses but the tendency has been for them to remove to make way for business. There was no question that the mill did cause annoyance to the plaintiff but there was no lack of due care in the management of the mill. The present bill was filed more than a year after the machinery was put in and more than eight months after the mill was in operation.

The defendants acted in good faith in installing their mill but the plaintiff was doubtless injured to some extent both personally and in business.

Cooley, J., said: "Generally speaking, it may be said that every man has a right to the exclusive and undisturbed enjoyment of his premises, and to the proper legal redress if this enjoyment shall be interrupted or diminished by the act of others. The redress, if the injury is slight or merely casual, or if it

is in any degree involved in doubt, should be by action for the recovery of damages; but if permanent in its nature, so that by persistence in it the wrong doer might, in time, acquire rights against the owner, it is admissible for the court of Chancery to interfere by injunction, provided the injury is conceded or clearly established."

The Court further found that the defendants were carrying on a legitimate business in a proper place and that there were other businesses in the block quite as likely to be offensive against which no complaint was made.

" We cannot shut our eyes to the obvious truth that if the running of this mill can be enjoined, almost any manufactory in any of our cities can be enjoined upon similar reasons. Some resident must be incommoded or annoyed by almost any of them. In the heaviest business quarters and among the most offensive trades of every city, will be found persons who, from motives of convenience, economy or necessity, have taken up there their abode; but in the administration of equitable police, the greater and more general interests must be regarded rather than the inferior and special. The welfare of community cannot be otherwise subserved and its necessities provided for. Minor inconveniences must be remedied by actions for the recovery of damages rather than by the severe process of injunction."

The case was dismissed and costs were assessed but the dismissal was without prejudice to any proceeding

the plaintiff might be advised to take at law, as, e.g. action for damages.

Comment. The court's opinion here is sufficiently explicit and agrees well with what comment we have made on *Bamford* v. *Turnley* — but it deals wholly with the question of injunction and does not invalidate an action for damages which may well lie even if the offender may legitimately continue his business. — Cf. the numerous suits for damages when railroads of all sorts are built.

STURGES *v.* BRIDGMAN

Court of Appeals in Chancery, 1879

(Reported 11 Ch. Div., 852.)

The plaintiff in this case was a physician who built a consulting room in his garden right against the establishment of a confectioner who, with his father before him, had occupied the premises and carried on the business for sixty years. The physician did not build a separate wall of his own, according to the defendants, and he was constantly annoyed by the noise made in two large marble mortars set in brick work against the wall which separated confectionery and consulting room.

The physician complained that the noise seriously interfered with his business, particularly preventing him from examining patients by auscultation for diseases of the chest.

In May, 1878, *Jessel, M. R.,* held that the plaintiff

was entitled to an injunction. The defendant appealed.

Thesiger, L. J., confirmed the injunction, maintaining that " an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence." " Until the noise became an actionable nuisance, which it did not at any time before the consulting room was built, the basis of the presumption of the consent, viz., the power of prevention, physically, or by action, was never present."

It might be objected that if such a principle were carried to its logical consequences, it might result in serious practical inconveniences. A man might go into an unsavory neighborhood and build a private residence and then complain of nuisances. But " whether anything is a nuisance or not, is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances; what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture carried on by the traders and manufacturers in a particular and established manner not constituting a public nuisance, judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong." [1]

Appeal dismissed with costs.

[1] Cf. also *Wilde, J.*, in *Dana* v. *Valentine*, 5 Met. 8, 14 (1842). "Another objection to the defendant's title by prescription is that

Comment. Thesiger's comment establishes the principle that one cannot protest against that which merely *may* some day be a disadvantage to him.

Negligent Destruction

BROWN *v.* ROBBINS

EXCHEQUER, 1859

(Reported 4 H. & N., 186.)

Plaintiff had a house one lot east from Bill Hay Lane. The lot next the lane had been mined in 1831 and in 1838 the lot west of the lane was mined, pillars and ribs of coal being left as supports. In 1857, the defendant again worked the lot west of the lane, removing the pillars and ribs and the plaintiff's house began to crack. The jury found that the defendant knew that the plaintiff's house and the mined lots had been there for twenty years and that the defendant's mining had caused the plaintiff's land to slide. The land would have slid had there been no house on it at all. The land slid of its own weight. It was held that the plaintiff had acquired the right of support of his house and that he should recover damages.[1]

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until lately the plaintiffs suffered no damage from the alleged nuisance, and therefore could not interpose to prevent its continuance. But it is very clear that where a party's right of property is invaded, he may maintain an action for the invasion of his right, without proof of actual damage."

[1] Cf. judgment of *Erle, C. J.*, in *Smith* v. *Thackerah* (Reported L. R. 1 C. P., 564) "There is no doubt that a right of action accrues

Comment. Reiteration of principle — that is wrong which injures a neighbor, but the further principle given that such injuries as are the necessary result of *proper* action with one's lawful property are not to be considered actionable.

STOCKPORT WATER WORKS COMPANY *v.* POTTER

Exchequer, 1864

(Reported 3 H. & C., 300.)

The plaintiffs had taken water from the Mersey River for the town of Stockport ever since 1853. In that year they had acquired the right from the Wood-

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whenever a person interferes with his neighbor's rights, as, for example, by stepping on his land or interfering with his right to vote. But for a man to dig a hole in his own land is in itself a perfectly lawful act of ownership, and it only becomes a wrong if it injures his neighbor; and since it is the injury itself which gives rise to the right of action, there can be no right of action unless the damage is of appreciable amount."

Also — *Williams, J.*, in *Robertson* v. *Youghiogheny Coal Co.*, 172 Pa. 566, 571 — "The grant of a mineral estate, or of the right to mine, is a grant of the right to penetrate the earth in search of the mineral stratum, and, when found, to quarry and remove the mineral in a proper manner. Such injuries as are the necessary result of this process do not afford a cause of action to the owner of the surface. If his springs are drained or his well destroyed as the natural result of the excavation made to reach and remove the coal, he has no right to complain. But a sale of all the coal under a tract of land is not in terms nor by necessary implication a release of the right to surface support any more than the sale of the first story of a building, two or more stories in height, would be a release of the floor so sold from its visible servitude to the remainder of the building."

bank Estate which had been in the habit of taking water for fourteen years previous to 1853. The defendants, owning property further up the stream, had fouled the stream, not maliciously but in the pursuit of their legitimate business. No riparian rights had been granted to the Stockport Waterworks Company, as they acquired none of the shore but only what was known as the Nab Pool Weir and the right to draw water. The plaintiffs were neither themselves riparian owners nor the assignees of such. *Pollock, C. B.*, in his opinion said, among other things: "It seems clear that the rights which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river. If he grants away any portion of his land so abutting, then the grantee becomes a riparian proprietor and has similar rights. But if he grants away a portion of his estate not abutting on the river, then clearly the grantee of the land would have no water rights by virtue merely of his occupation. Can he have them by express grant? It seems to us that the true answer to this is that he can have them against the grantor but not so as to sue other persons in his own name for an infringement of them." He also said that there had been no continuous use of the water for twenty years constituting what is called an easement. The water had been used by the plaintiffs only since 1853. Before that it was used by others in the enjoyment of riparian rights. Moreover there was no right by prescription, adverse holding against all comers, since the right had been disputed and an award made.

Judgment was therefore given for the defendants but *Bramwell, B.*, in a dissenting opinion, said, "Suppose the person fouling the water was not a riparian proprietor but a mere wrong doer, why should not an action lie against him? I can see no reason, nor can I see that his being a proprietor makes any difference. Upon these considerations (Others had been cited, G.C.C.) it seems to me this action is maintainable. I think it might fairly be asked to what extent I would carry the principle upon which I decide this. My answer is, to the extent to which the analogous case extends of a grantee of a right of way. Where a grantee of a right of way could maintain an action for disturbance of his way, so do I think the grantee of a right of water might. . . . I am aware of the case of *Keppell* v. *Bailey*, 2 Myle & K. 516, and agree that new rights of property cannot be created, but I think that rule does not interfere with the present case. There, an owner of land was resisting a burden put upon it by a former owner, and it was held that burden could not be attached to the land in the hands of the assignee. Here, no doubt, it can be, that is to say on the lands of the riparian proprietors (the Messrs. Marsden, owners before 1853). The question is not with them, but with one who would be a wrong doer if he had no riparian estate or occupation, and is not the less so because he has (i.e. the defendant).

Baron Bramwell would give the decision to the plaintiffs.

Comment. Baron Bramwell's analogy seems to be sound; but the whole case depends upon what the property rights were. The majority opinion settles that for us. Had the Stockport Water Works been publicly owned, probably the defendants would have been found guilty; but on the ground of public policy, not because they were violating any individual's property rights.

ROBERTS *v.* GROYFRAI DISTRICT COUNCIL

Chancery Division, 1899

(Reported 1 Ch., 583.)

The plaintiff owned and occupied an ancient water mill. At the head of the stream which supplied it was a lake from which the defendants desired to supply surrounding towns with water for domestic purposes. They tried to get the plaintiff's permission but this was refused. Defendants then dammed up the lake, leaving a place for the water to get out. It was conceded that the flow was more regular than it had been before and was sufficient for the use of the plaintiff. Indeed it was somewhat better for his mill than it had been.

But the plaintiff sought an injunction to restrain the defendants from taking any water from the lake and from doing any act whereby the flow of water in the stream through and by the plaintiff's mill and lands would be diminished.

The defendants claimed riparian rights including the right to supply their district with water. They

admitted that their action would cause the abstraction of about one-sixteenth of the water in the lake.

Kekewich, J., held that the law on the subject had been threshed out again and again. "A riparian proprietor or owner is entitled to say that the water which flows by his property and which is used by him for ordinary, or it may be for extraordinary, purposes shall flow in the future as it had done in the past. This seems to be the common law right; and unless that common law right has been affected by statute he is entitled to insist upon it." Judgment for the plaintiff later affirmed in (1899) 2 Ch. p. 614, where *Lindley, M. R.*, said, "The defendants have in fact most materially altered the flow of the water to which the plaintiff is entitled. His rights are infringed by persons who admit that they have no right to do what they are doing; and under the circumstances unless the infringers are prepared to stop what they are doing, an injunction to restrain them is almost a matter of course. . . . I cannot appreciate the difference, for the present purpose, between claiming a right to do a thing, and saying, 'I admit I have no right to do it, but I intend to go on doing it.' If there is any difference, it is rather against the man who admits that he has no right to do a thing, but insists on doing that which he admits to be wrong."

Comment. This case appears at first sight to be decided adversely to the principle, "So use thine own, etc.," because it was granted that the flow of water to the mill was improved, if anything, by the change; but it is

important to add that the flow of water had been materially changed and that it would be dangerous indeed to allow others to be the judge of what our desires were. If the plaintiff here may be judged a somewhat disobliging person he was nevertheless strictly within his rights.

PITTS *v.* LANCASTER MILLS

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1847

(Reported 13 Met., 156.)

The declaration alleged that Samuel Carter was seized and possessed of a close, water mill, ancient dam and the water privileges thereto appertaining, situate on the north branch of Nashua River, in Lancaster, and the right of having the whole water of said stream flow without obstruction, for the benefit of said mill, and of having the uninterrupted use and occupation of said mill and privileges; and that said Carter, being so seized and possessed, leased the premises for a term of years to Hiram Pitts, who underlet the same to the plaintiffs; that the defendants, a corporation established by statute in 1845, wrongfully built and raised, above its usual height, their dam, situate across said stream, above the mill, etc., occupied by the plaintiffs and thereby hindered the water from flowing in its usual course, and thereby, for the space of two days in June and four days in July wholly cut off the water from the plaintiff's mill. The case was submitted to the court upon the following agreed statement of facts:

"The plaintiffs are the lessees of said mill, dam and privileges. The defendants were the owners of a privilege on the said stream, above the mill of the plaintiffs, whereon a mill had stood for some years; they erected a new mill thereon, and, for the purpose of using the whole power, raised the dam higher than it had formerly been, and kept the water back, so long as was necessary to fill their pond and no longer. To have delayed filling said pond, until a freshet or flow of water should have raised the same, would have endangered said dam; and by keeping the water back as aforesaid, the operations of the plaintiffs' mill were retarded or wholly suspended."

Shaw, C. J., said: "Every proprietor of land, through which a current of water flows, has a right to the use of it on his own land, amongst other things for mill purposes, making such reasonable use of it, and of the mill power furnished by it, as he can consistently with a like reasonable use by other proprietors, above and below, through whose land it passes. What is a reasonable use must depend on circumstances; such as the width and depth of the bed, the volume of water, the fall, previous usage, and the state of improvement in manufactories and the useful arts.

"It appears . . . that having erected a new dam, which they had a right to do, they, (the defendants) detained the water no longer than was necessary, etc. — this was not an unreasonable use." [1]

Judgment for defendants.

[1] Cf. also *Wheatley* v. *Chrisman*, 24 Pa. 298, 302 (1855).

"The proposition of the defendant was, that he had a legal right to use a *reasonable* quantity of the water for the purposes of his business. The court replied that his business might reasonably require more than he could take consistently with the rights of the plaintiff: We cannot see how or on what principle the correctness of this can be impugned. The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both. The true rule was given to the jury. The defendant had a right to such use as he could make of the water without materially diminishing it in quantity or corrupting it in quality. If he needed more he was bound to buy it."

Comment. The decision here seems to be in contradiction of the preceding case of *Roberts* v. *Groyfrai*, etc. The latter is an English case, the present one is American, but *Wheatley* v. *Chrisman* here cited agrees rather with the Roberts case and it also is American. There is thus no harmony obtainable here.

Property — Accidental or Negligent Destruction

CITIZENS RAPID TRANSIT CO. *v.* DEW

100 Tennessee, 317, 1898

(Milburn's Curious Cases, p. 310.)

A valuable bird dog was killed in plain sight of the conductor and motorman (one person) on the highway known as the Charlotte Pike. The dog was running

along the pike some one hundred and fifty yards in front of the plaintiff's vehicle when he started across the trolley track. He saw some little birds and stopped to "set" or "point" them. While thus absorbed the trolley car came noiselessly upon him not sounding its bell or making any effort to stop. The dog was so badly injured that his master shot him and then brought suit for damages.

The negligence of the motorman was plainly established. The dog was not a trespasser and it was perfectly proper for his master to put him out of his misery — so held the court of appeals, the master having been awarded damages in the lower court.

Much effort was made to establish the worthlessness of dogs,[1] but "it is a matter of common knowledge" that certain strains add materially to if they do not quite establish the value of dogs, horses, etc. This was a valuable dog and the lower court rightfully awarded damages of $250.00.

Recovery for Negligence

Judge Brown in *Perpich* v. *Leetonia Mining Co.*, 112 B. L. S. 151. It is well established, though perhaps not by a uniform line of decisions by all the courts, that when, through the negligence of one person, another is placed in imminent peril of his life, a third person standing by, who successfully rescues or unsuc-

[1] Dogs have had their status as property established by statute in many states and they are now generally accepted as having value. Cf. Ely. *op cit.*, p. 111 for references to the statutes and various decisions.

cessfully attempts to rescue the imperilled person may recover for injuries received by him in the attempt, in an action against the one whose negligence imperilled the life of the rescued person, unless it appears that the attempt to rescue was clearly one of rashness or recklessness under the circumstances presented.

The authorities are collected in a note to *Corbin* v. *City of Philadelphia,* 49 L. R. A. 715.

Comment. The fact that money damages can be collected puts this in the property classification.

Taxation

In *Kirtland* v. *Hotchkiss,* 100 U. S. 491, it was held that a state (in this case Connecticut) can tax its citizens in any way which does not conflict with the Constitution of the United States; and that the Constitution does not prohibit the taxation of its citizens for debts held by them against a non-resident.

KENTUCKY RAILROAD TAX CASES

115 U. S. 321

State statutes which provide for the raising of money by assessment and collection of taxes, which provide for the proper protection of owners and offer them the opportunity, in a suit at law for the collection of the tax, to judicially contest the validity of the proceeding, do not necessarily deprive owners of their property "without due process of law." Nor are different

classifications of property a denial of the "equal protection of the laws" if they provide for the impartial application of the same means and methods to all constituents of each class.

THE NATURAL LAW IN PROPERTY OFFENSES

All property offenses seem to be variations of theft. *The essential act is to take to oneself what belongs to another.* We have no concern with the definition of property. The civil law has many interesting things to tell us of the distinction between property in a thing and possession of it; but in itself this distinction does not interest us, nor are we concerned either to uphold or to attack the institution of private property. Through all the changes which the conception of private property has undergone, and is now undergoing, a most admirable and interesting account of which can be found in Professor Richard T. Ely's book "Property and Contract," the various types of offenses here indicated have persisted. The particular offense is often an ephemeral matter. I think that my seven main classifications are permanent. They must hold wherever the institution of property holds, and that will be everywhere — because even under Communism of a more extreme type than we know of historically or dream of as an ideal, property would be in the community and it would be both possible and probable that men would offend against it.

The nature of private property is indeed most illuminatingly set forth by the mere statement of the

different kinds of offenses against it; but there is no interesting gradation as in killing, between those kinds invariably condemned and those which are universally approved. We may, to be sure, note that there is made a different logical classification from that under killing, since that classification was based upon different attitudes of society toward killing and degrees of assault, throughout human history. The Spartans taught their children to steal and made discovery the only crime, but our knowledge of this people is after all very slight and from remote sources. Theft is universally a crime, punished with death until modern times, or with penalties so severe that death would seem preferable.

The gradations are perhaps as follows:

1 Taking possession of enemy property in war, or, when unhampered by commercial treaties, by fraud or deceit in time of peace, is not condemned by the group. "Spoiling the Egyptians" has ever been considered meritorious *by the group.*

2 Burglary, arson, brigandage, highway robbery, because accompanied with violence, and all forms of larceny which by their nature threaten the institution of property itself, and those forms which are peculiarly dangerous to life, like horse stealing in border states, are severely condemned by the group, but no longer punished by death.

3 Frauds, appropriation by compulsion, breaches of trust, attacks upon personality — while highly

differentiated by the law as to exact punishment, are classifiable together as offenses which society does indeed often punish with great severity; but there has been little poignancy of emotion over them, and the plain thief who steals a pair of shoes or a loaf of bread suffers social condemnation of a kind frequently not visited upon the offenders in these classes.

4 The attitude of the civil law toward the innkeeper's lien is strongly analogous to its approval of self-defense in killing cases. The innkeeper may take the law into his own hands to the extent of retaining the property of a guest until all just charges made by him are paid. But he cannot sell the property at will to satisfy his claim; and property might be left with him so long that the cost of keeping it would be more than it was worth. In that case he could bring the matter before the proper court which would order the property sold to pay his bill. His inability to go to an extreme in recovering his property thus is comparable to the refusal of the law to permit a man in self-defense to do more than *defend* himself.

5 Those property offenses which I have classed under 7 — "Rights as between two parties, etc.," show by the very title that there is not here *necessarily* anything approaching theft. There may in these cases, especially those concerned with trespass, riots, nuisances and negligent destruction of property, often be something very close to malice.

This may even be true in tax cases, eminent domain, contracts and infringement of trade marks — *but there need not be.* Hence, as property cases, they approach the indifference point. The whole question to be resolved by a court is — In whom does the property vest in reality? or perhaps — How will social good best be conserved? This last is evidently the case with eminent domain. And while we have a constitutional guarantee that no man's property may be taken from him without due process of law and proper compensation, this is an ideal only. A notable example of the failure of this constitutional guarantee was in the appropriation by the United States of the whole of the compensation given by France for the destruction of American shipping at the time of the French Revolution. No claims against the United States were allowed for about one hundred years; and then only a very small amount was appropriated by Congress for the purpose of payment — and no interest was allowed.

(Note that there must always be *damages* in this class — though there be no *guilt.*)

6 One can detect no logic in the gradation of penalties for infringement of property rights. It is hopeless to attempt to bring order out of this chaos. Penalties vary in the different states and in different countries. Some are exceedingly severe and others amazingly light. They have just "growed" like Topsy in Mrs. Stowe's romance.

To be sure, the penalties for forgery and breaches of trust are very heavy, much heavier than for petit larceny or, in some cases, even for grand larceny, but there can be no doubt that, socially, the forger and the embezzler are more respectable than the plain thief — and there is a glamour still about the brigand and the highway robber which certainly does not attach to the burglar or the "fire bug."

One may with some confidence conclude that the offenses against property are equally with those against life, offenses against the group. This will more prominently appear in security cases. Property cases are, after all, somewhat obvious. When one has said "thief," he has said the last word. The thief cannot be tolerated; though it has taken the world a long time to realize that the "respectable" forms of theft are as dangerous as, yes, much more dangerous than, simple larceny.

Three points

(1) Steal anything or take anything from an enemy of the group; but only in so far as he is plainly enemy.

(2) All forms of theft *within the group* will be punished — in the degree that they threaten the stability of the group — but this is modified by feudal custom and failure to realize what really threatens the group.

(3) Eminent domain expresses the principle that all property, in the final analysis inheres in the group.

Salus populi suprema lex.

OFFENSES AGAINST SECURITY

In the Preservation of Life and Limb, and the Preservation of Prop and Public Order

I. Preservation of Life and Limb.

- Attacks on the army and nav
  - police and quarantine
- Treason (security of State thre
- Mutiny (" " ship, little
- False imprisonments
- Unfair trials
- Neglect of precautions
- Violations of fire and factory la
  - (Employment of minors)
- Violations of Pure Food and D
  - lations, of ordinances relatin
  - and Harbors, highways
- Excessive hours of labor, especi
  - ship lines, etc.
- Neglect of safety devices, sanit
- Carrying concealed weapons
- Practising medicine without a
- Negligent running of automob
  - (license cases)
- Negligence in electric wiring, e
- Negligence in keeping up fence
- Keeping unsafe animals
- Negligence in hunting, etc.

II. Preservation of property (cf. also

(a) Attacks upon credit

- Forgery
- Counterfeiting
- Raising checks
- Kiting checks
- Falsifying acco
- Using mails to
- Stealing from
  - panies, etc.
- Insurance frau
- "Blue Sky" la
- Creating panic

- Combinations i
- Cornering mar
- "Gentlemen's
  - law or defra
- Rebates
- Strikes and loc
- Labor Unions

many laws of adultery based on that)
Seduction
Alienating affections
Breach of promise of marriage

Blackmail
Libel
Slander
Invading privacy

or encouraging commercial prostitution
t Districts, Mann White Slave Law, etc.)
nces (noises, smells, sounds)
or erecting spite fences
osure
ication
rderly houses, saloons, etc.
nday laws
ractices, sodomy, etc.
disturbing public worship, etc.
graves, public monuments, etc.
ducation
the peace

ssification is the least good of the four made, and
a "catch all" but as a serious attempt at scientific
any of the offenses here imperfectly classified tend
nce of any society.

PART III

PRESERVATION OF SECURITY

SECURITY A SUPREME NEED

Gilchrist, C. J., in *Beach* v. *Hancock*, 27 New Hamp. 223: "One of the most important objects to be attained by the enactment of laws and the institutions of civilized society is, each of us shall feel secure against unlawful assaults. Without such security society loses most of its value. Peace and order and domestic happiness, inexpressibly more precious than mere forms of government, cannot be enjoyed without the sense of perfect security."

Comment. Gilchrist's opinion is a classic expression. It may be taken as a generalization of the highest importance which will illuminate all the cases in this section.

It is obvious that no body of laws can give this "sense of perfect security;" but the content of the laws and of judgments will indicate at least the *purpose* of their enactment.

I. SECURITY IN LIFE AND LIMB

ATTACK ON ARMY

New York Times, February 19, 1916.

The proprietors of the weekly journal *Bystander* were fined £100, the former editor, Vivian Carter, was fined £50, and Lieutenant Bernard, cartoonist, £50, today for publishing a cartoon depicting a British

soldier lying intoxicated beneath a tree and clasping a bottle of rum. Beneath the cartoon were the words, "Reported Missing."

The charge was preferred under the Defence of the Realm act on the ground that publication of the cartoon was prejudicial to discipline and recruiting. An appeal was entered.

Comment. Probably no notice would have been taken of such a cartoon had it not been published at such a time in the nation's history.

Attack on Courts

KING'S BENCH, 1688

(Reported Comberbach, 46. Beale, 71, 2d ed.)

A man was indicted for words spoken of a justice of peace (a buffle-headed fellow) and an exception was taken that the words were not indictable.

But the Court held that, because it appears they were spoken of him in the execution of his office, the indictment is good. All actions for slandering a justice in his office may be turned into indictments.

STATE *v.* HOLT

SUPREME JUDICIAL COURT OF MAINE, 1892

(Reported 84, Maine, 509. Beale, 78, 2d ed.)

The defendant, knowing that one Fred N. Treat had been summoned to appear before and give evidence to

the Supreme Court, and intending to obstruct the course of justice, caused Treat to become intoxicated and then removed him so that he could not give testimony.

Walton, J., held that "a wilfull and corrupt attempt to prevent the attendance of a witness before any lawful tribunal organized for the administration of justice is an indictable offense at common law."

Comment. Various opinions quoted uphold the principle that anything tending to obstruct the course of public justice is indictable at common law. Bribing, intimidating, and persuading witnesses, to prevent them from testifying, or to prevent them from attending court, have been among the most common and the most corrupt of this class of offenses.

Authority of the State — Courts

STATE OF KANSAS *v.* GEORGE LEWIS

(19 Kan. 260. 1897.)

The defendant was imprisoned in the county jail of Atchison County on the criminal charge of burglary in the second degree, awaiting a trial upon such a charge; and while so imprisoned he broke jail and escaped.

Afterward a warrant was duly issued for his arrest upon the charge of breaking jail and custody. He was apprehended, hand-cuffed and taken before a justice for a preliminary examination. He was then tried on the charge of burglary and acquitted. The county

attorney then had him arrested on the charge of breaking jail and custody. He endeavored to escape this charge on several grounds; but his pleas were all swept aside.

The statute reads "If any person, lawfully imprisoned in any county jail or other place of imprisonment, or in the custody of any officer upon any criminal charge, before conviction for the violation of any penal statute, shall break such prison or custody and escape therefrom, he shall upon conviction be punished by confinement and hard labor for a term not exceeding two years, or in a county jail not less than six months."

The offense was in flouting the laws of the state. It made no difference that he was not guilty of the first offense with which he was charged. Both the court of first instance and the court of appeals found him guilty.

Comment. For unlawful imprisonment there is the legal remedy of *habeas corpus*. Where imprisonment is lawful there would be, logically, no one more certain to be punished than the man who should endeavor to escape.

The error of the state — if it was an error — in charging defendant with burglary is no excuse for his contemptuous attitude towards the institutions under which all justice is administered, insofar as it is administered at all.

QUARANTINE

STATE *v.* MAYOR AND ALDERMEN OF KNOXVILLE

SUPREME COURT OF TENNESSEE — 1883.

(Reported 12 Lea, 146. Beale, p. 494, 2d ed.)

In 1882–3 the small-pox as an epidemic prevailed to a considerable extent in Knoxville, Tenn. Among the quarantine provisions established a small-pox hospital was installed at the fair grounds, and the bedding, bedsteads, clothing, etc., of persons suffering with the disease, were burned in pits dug for the purpose. The burning was done some four hundred yards from the nearest houses but the smoke and scent from the burning clothing, etc., was offensive. The Mayor and aldermen were indicted for a nuisance and found guilty. On appeal to the Supreme Court this judgment was reversed and a new trial ordered.

Freeman, J., in his opinion acknowledges the nuisance on the basis of the facts but questions whether there were not perhaps sufficient justification and authority for the acts.

It was clear that the means taken by the defendants were calculated to put an end to the epidemic as soon as possible, and that they were approved by hospital authorities.

" If this be so, then the simple question is, whether parties using such means so accredited, in good faith,

shall be held criminally liable if they should produce temporary inconvenience to other parties nearby. . . .

The loss to the individuals was only a temporary one . . . offensive though it was; yet if this was done in order to, and did reasonably tend to, prevent the spread of a loathsome and dangerous disease . . . then it is too clear to doubt that the interest of the life of many cannot be permitted to be imperilled that others may enjoy the air untainted by smoke from clothing infected by the disease being burned at a reasonably safe distance from their dwellings. If you may rightfully destroy the house in which a man dwells in order to prevent the spread of a fire or the ravages of a pestilence, it follows you may much more destroy for a time the salubrity of the air, provided it shall tend reasonably to the result demanded by the public interest."

Comment. Security of group clearly made paramount, no matter what damage may be done to individuals.

Treason

In the United States the Constitution defines and limits the crime by declaring that "treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort."

In English Statutes (25 Edw. 3 c. 2), treason is declared to consist (1) in compassing or imagining the death of the King or Queen or their eldest son or heir;

(2) in violating the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son or heir; (3) in levying war against the King in his realm; (4) in adhering to the King's enemies in his realm, giving them aid and comfort in his realm or elsewhere; (5) slaying the chancellor, treasurer, or the King's justices of the one bench or the other, justices in eyre, or justices of the assize, and all other justices assigned to hear or determine, being in their places and doing their offices.

The crime was further extended in England by later statutes, particularly 11 Vict. C. 12 P. 11, which in effect declares it to be treason for any person or persons within the realm or without to compass, imagine, invent, devise or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment, or restraint, of the person of the King, or his heirs, successors, and such compassings, imaginings, inventions, devices or intentions, or any of them, to express, utter or declare, by publishing any printing or writing, or by any overt act or deed.

Courts have been unwilling to recognize any defense to treason. The only defense is in the case where it is committed under duress and compulsion, as in *United States* v. *Greiner,* 26 Fed. Cas. No. 15,262, 4 Phila. (Pa.) 396.

The statutory punishment for treason is death, or, at the discretion of the Court, imprisonment at hard labor for not less than five years, together with a minimum fine of $10,000 and incapacity to hold any office under the United States.

THE SINN FEIN REBELLION

Information Quarterly, July, 1916, p. 228.

On April 22, 1916, Sir Roger Casement landed in Ireland from a German submarine, but was promptly arrested. Almost simultaneously, a serious revolt broke out in Dublin. The insurgents issued a proclamation of independence and revolt against England. Risings occurred in other parts of Ireland as well. Ireland was placed under martial law and on May 1st the "seven days" revolt came to an end with the surrender of Provisional President Pearse and his orders to his followers to lay down their arms. Much damage was done and many lives were lost.

On May 3d, Premier Asquith announced that, after a court martial, Patrick H. Pearse, Thomas J. Clarke and Thomas McDonough had been shot that morning in the Tower of London; others had been sentenced to penal servitude. Later, others were executed and fifteen sentenced to death had their sentences commuted to ten years' penal servitude. The premier stated that three classes of men had been executed. 1. Those who signed the proclamation of the provisional government — actual leaders of the rebellion, five out of seven having been shot. 2. Men in command of rebels actually shooting down troops and police (124 killed, 388 wounded, and 9 missing) and 3. Murderers. The two remaining signers of the proclamation were later shot.

May 10th the government admitted that F. Sheehy

Skeffington, editor of *The Irish Citizen,* and two other journalists, had been executed without the knowledge of the military authorities and before martial law was actually in operation. The officer responsible for the shooting acted without the knowledge of his superiors and would be court martialed. He was later court martialed, found "guilty but insane" and sent to a criminal lunatic asylum.

Sir Roger Casement was tried for high treason May 15th. The hearings were public. He was found guilty, having endeavored to raise an Irish regiment for Germany among Irish prisoners in Germany and having landed with hostile intent against the government of Great Britain, in Ireland.

Sir Roger appealed his case, alleging, First, that no crime had been committed under the statute of Edward III by which he was tried, because no such crime as treason "without the realm" was indicated in the statute; Second, that the Lord Chief Justice erred in the use of the term "aiding and comforting the enemy;" Third, because the Lord Chief Justice in his charge to the jury did not properly set forth the defendant's side of the case.

The appeal was dismissed after hearing the attorneys of Sir Roger. Many signed a petition for clemency and Justice Darling announced that he would sit on July 28th to "hear a possible application on behalf of the convict." The nature of the application was not disclosed. On the following day the defense abandoned any contemplated action.

Sir Roger Casement was hanged at 9 o'clock in the morning of August 3d, 1916, in Pentonville jail.

Comment. There can be no doubt that all of these men were traitors to the British Government, in spite of the technical defense of Sir Roger. They had for years talked seditiously and had fomented a spirit of denial of the right of the British Government to rule Ireland. Sir Roger received his title from the Crown and none of those sentenced had any other civil standing or allegiance.

New York Times, February 27, 1916.

Mrs. Nellie Best, Secretary of the Women's Anti-Conscriptionist League, was sentenced today to six months' imprisonment in the Westminster Police Court for circulating literature urging men not to enlist.

On being asked whether she was represented by counsel, Mrs. Best said:

"I am defended by the Lord, who told us not to kill."

"I have been responsible for keeping hundreds of lads from recruiting into the trade of war," she continued, "and each night I have thanked God for giving me the opportunity, and have asked strength to do the same thing the next day."

Comment. Mrs. Best's highest allegiance was given to what she believed to be the voice of God. For the state, whether theistic or antitheistic, its own interests are paramount. If theistic, it always claims an identity of purpose and motive with the will of its God.

In September, 1775, James Smith, a judge of the Court of Common Pleas for Dutchess County, New

York, together with Coen Smith of the same place, were "handsomely tarred and feathered" for acting in open contempt of the resolves of the County Committee. "The judge undertook to sue for, and recover the arms taken from the Tories by order of said Committee, and actually committed one of the Committee, who assisted at disarming the Tories, which enraged the people so much, that they rose and rescued the prisoner, and poured out their resentment on this villainous retailer of the law. (Cutler's Lynch Law, p. 70, quoting from Frank Moore's "Diary of The Revolution.")

At Charleston, S. C., in 1776, "John Roberts, dissenting minister, was seized on suspicion of being an enemy to the rights of America, when he was tarred and feathered; after which, the populace, whose fury could not be appeased, erected a gibbet on which they hanged him, and afterwards made a bonfire, in which Roberts, together with the gibbet, was consumed to ashes." (*Ibid.*, p. 71.)

TREASON TREATED BY LYNCH LAW

In the days of the American Revolution there were in the mountainous sections of Virginia both many desperadoes who stole horses and committed other outrages, and also many convinced Tories who opposed the patriots with skill and vigor. There were none but county courts nearby and these were merely examining courts. In order to have felonies tried it was neces-

sary to take prisoners to Williamsburg, more than two hundred miles away from Bedford County where Charles Lynch lived.

After deliberation with his neighbors, he decided to take matters into his own hands "to punish lawlessness of every kind, and so far as possible to restore peace and security of their community." A court was formed of which Lynch was the head and William Preston, Robert Adams, Jr., and James Callaway were assessors.

Regular legal procedure was employed. When news of the invasion of Virginia by Cornwallis was received, there arose great activity among the Tories. "A conspiracy was formed to overthrow the county organization and seize, for the use of Cornwallis on his arrival, the stores that Lynch had collected for Greene's army in North Carolina." Several men were arrested, tried and condemned to severe penalties. One of them, Robert Cowan, who had formerly been a fellow justice on the county bench and who was believed to have been the ring leader, was sentenced to a year in prison and to pay a heavy fine.

Even if this court could be considered a regular county court, it had transcended its powers. "After the war the Tories who had suffered at his hands, threatened to prosecute Colonel Lynch and his friends. To avoid lawsuits and as a means of finally settling the matter, Lynch brought the whole matter before the Virginia legislature." The legislature passed an act indemnifying and exonerating them all. Similar acts

were passed at other places and times under similar conditions. (Cf. Cutler's Lynch Law, pp. 25 ff. and passim.)

Comment. In justification for classifying this as a case of Treason, note that the act was called "An act to indemnify certain persons in suppressing a conspiracy against this state" and that it says "certain evil disposed persons . . . formed a conspiracy and did actually attempt to levy war against this state."

It is evident that in earlier days, notably in the 17th Century, charges of treason were frequently preferred on purely political grounds. The offenses were great enough to deserve punishment but the trials were conducted with such manifest unfairness (Cf. Stephen, Vol. I passim) that even partisans were revolted. And these cases are not contradictory of my claim that treason is always punished with death, when known to be such, at least in time of war.

It is pertinent here to set down the opinion of Sir J. F. Stephen (Vol. I, p. 425): "Criminal justice was originally a rude substitute for, or limitation upon, private war, the question of guilt or innocence, so far as it was entertained at all, being decided by the power of the suspected person to produce compurgators or by his good fortune in facing an ordeal. The introduction of trial by combat, though a little less irrational, was in principle a relapse towards private war, but it was gradually restricted and practically superseded many centuries before it was formally abolished."

Modern criminal procedure described in Ch. XII, p. 428 — for the past 150 years now —

"Litigation of all sorts, and especially litigation which assumes the form of a criminal trial, is a substitute for private war, and is, and must be, conducted in a spirit of hostility which is often fervent and even passionate, etc." (P. 432.)

Mutiny

Mutiny is to usurp the command of a vessel from the master or deprive him of it for any purpose, by violence, or in resisting him in the free and lawful exercise of his authority; the overthrowing of the legal authority of the master with an intent to remove him against his will and the like. See *Thompson* v. *The Stacey Clarke,* 54 Fed. 533.

In the United States, mutiny or revolt is made a crime by statute. (See Par. 5360 U. S. Comp. St. (1901), P. 3640.)

The Act of April 30th, 1790 (1 U. S. St. at L. 114), by which the making of a revolt in a ship was first made a crime, declared that if a seaman should make revolt in a ship, he would be adjudged a pirate and a felon, and upon conviction should suffer death, without enumerating the acts that would constitute a revolt. The Courts, however, declared that the crime was committed when the crew, or any part of them, threw off all obedience to the commander and took forcible possession of the vessel by assuming and exercising the

command and navigation of her, or by transferring their obedience from the one lawfully in command of her to one who had usurped command. (*U. S.* v. *Haskell,* 26 Fed. Cas. No. 15,321.)

False Imprisonment

False imprisonment is the unlawful and total restraint of the liberty of the person. The imprisonment is false in the sense that it is unlawful. The right violated by this tort is the freedom of the right of locomotion. The right invaded by false imprisonment is of such character that the liability of the wrong-doer is not dependent primarily upon intent.

Neither malice nor, ordinarily, want of probable cause, is an essential element of the right of action.

Arrest is not essential. (See *Garner* v. *Squires,* 62 Kan. 321.)

Arrest is sufficient notwithstanding immediate release. (*Harness v. Steele,* 159 Ind. 286.)

False imprisonment may be committed by words alone, or by acts alone, or by both; it is not necessary that the individual be actually confined or assaulted or even touched. (See *Camer* v. *Knowles,* 17 Kan. 436; *Bennett* v. *Sweet,* 171 Mass. 600; *Johnson* v. *Tompkins,* 13 Fed. Cas. 7,416.)

The wrong may be committed at any time or place, as in *Woodward* v. *Washburn,* 3 Den. (N. Y.) 369. The locking of the door of a bank at a usual and known hour was held to be a sufficient wrongful detention.

Whenever it appears that the person complaining was restrained without legal authority for an appreciable time, however short, a case of false imprisonment is made out, as in *Callahan* v. *Searles*, 78 Hun (N. Y.) 238, a few minutes were deemed sufficient.

Unfair Trials

STOKES *v.* STATE

TENNESSEE, 1875

(5 Baxt. 619. Milburn's Curious Cases, p. 304.)

The prisoner was indicted for the murder of Mrs. Housen in the Criminal Court of Davidson. He was tried, convicted of murder in the second degree, and sentenced to twenty years in the penitentiary.

Mrs. Housen was taken from her house at night and carried some distance and hung to what the witnesses term a "hog pole." Near the place where she was hung a track was found in the mud, made by a bare foot. The inference from all the surrounding circumstances is that the person who made that track was one of the parties engaged in the murder.

Lea, Sp. J., was convinced that the jury in part based their conviction upon the belief that the track found in the mud was made by the foot of the prisoner. During the trial the prosecuting attorney had a pan of soft mud brought into court and repeatedly asked the prisoner to put his foot in it. The court did not re-

quire him to do this, but said that he might if he wanted to. According to the record he did not so put his foot in; his refusal to do so may have seemed evidence of guilt to the jury; and it is no sufficient answer that the judge told the jury that his refusal was not to be taken as evidence against him.

The court of appeals was satisfied that the case of the prisoner had been prejudiced by this action, saying, "although we might be satisfied of the prisoner's guilt, yet it is our duty to see that he has a fair and impartial trial, and this he must have though costs may accumulate and punishment be long delayed."

Classes of cases which have to do with neglect on the part of employers, etc.

FELLOW SERVANT DOCTRINE OF RESPONSIBILITY

Employees on entering service take upon themselves as incident to the hiring the risks from negligence or carelessness of their fellow servants. *Cunningham* v. *Syracuse Improvement Co.*, 20 A. D. 171.)

In the case of *Brick* v. *Rochester, N. Y., etc., Ry. Co.*, 98 N. Y. 211, a railroad employee engaged in travelling on a construction train, knowing that he is not working on a completed road in good repair, assumes the hazards incident to the same, and the company cannot be held liable for his death through the negligence of an employee whose duty it was to keep the track in

good condition, but who allowed frozen mud to accumulate at a crossing and thereby caused a construction train to run off the track.

Comment. This rule has been modified by the Workmen's Compensation Law, and cases which follow will indicate the change.

Master and Servant — Risk

STREETER *v.* WESTERN WHEELED SCRAPER COMPANY

SUPREME COURT OF ILLINOIS, 1912

(98 Northeastern Reporter, 541. 112 Bul. Lab. St., 69.)

"The doctrine of the assumption of risk is firmly established as a part of the law of master and servant. The relation of master and servant exists only by virtue of contract, and to that relation, the instant it is created, the law attaches the doctrine of the assumption of risk. Under that doctrine the servant assumes all the ordinary risks incident to the business, all the extraordinary risks of which and of the danger of which he has knowledge, and all other obvious risks, and this whether any of such risks existed at the time of his employment or may have come into existence subsequently, provided, only, they have come to his knowledge. This condition attaches at the time of his employment and continues unchanged during his employment. It is an incident of the relation and has its

origin in the contract by which that relation is formed. It becomes a part of the contract because the law attaches the liability or obligation to the contract.

It may be that the ground of the doctrine of assumption of risk, as well as of its extension to known extraordinary risks and to obvious risks, is the maxim *volenti non fit injuria;* but, nevertheless, it is only as an incident of the contract of employment — as a part of such contract — that it comes into existence at all. A waiver of the benefit of the statute is in the nature of a contract. It is an assent to a change in the servant's rights and liability under his contract of employment. His conduct may be evidence of such assent, but it does not change the character of the relation.

The assumption of risk by the servant is not different in its character from the obligation of the master to use reasonable care to furnish the servant a reasonably safe place in which to work and reasonably safe tools to work with. In neither case is the obligation an express term of the contract, but in each case it arises out of the contract by operation of law. While the master is bound to reasonable care for the safety of the servant's place and tools, he is not bound to the highest degree of care. He is not bound to furnish a place that is absolutely safe or the safest possible place, but only one that is reasonably safe. He is not bound to furnish the safest tools or machinery or the best and most improved, but only such as are reasonably safe. The master may conduct his business in his own way, though another way would be less hazardous

and the servant who enters his employ knowing the method in which the business is conducted assumes the risk of such method.

The doctrine of assumption of risk in this class of cases is of modern origin. Its application to the law of master and servant was first suggested by Lord Abinger in *Priestly* v. *Fowler,* 3 M. & W. 1, and was first declared in this country in *Farwell* v. *Boston & Worcester Railroad Corporation,* 4 Metc. (Mass.) 49, 38 Am. Dec. 389, in 1842. The opinion in that case, written by Chief Justice Shaw, places the doctrine squarely on the basis of contract, and its reasoning has been universally adopted by the courts of this country. Speaking of the exemption of the master from liability to his servant for an injury through the negligence of a servant of the same master engaged in a different department of duty, it is said: "The master is not excused from liability, in such case, because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself, and he is not liable in tort as for the negligence of his servant because the person suffering does not stand in the relation of a stranger, but is one whose rights are regulated by contract, express or implied." The mutual rights and liabilities of master and servant were universally determined upon this basis for half a century without question, until legisla-

tion of the character of that now in question, which is of much more recent origin than that of the assumption of risk, began to be adopted in various states. Then the theory began to be asserted that the doctrine had its origin, not in contract, but in the maxim *volenti non fit injuria,* and that the maxim applied equally whether the risk assented to arose from mere neglect or the violation of a statutory duty. Whatever the origin of the doctrine, in the end it is the servant's agreement that creates the assumption of risk. The servant must be *volens* (that is, willing, consenting, agreeing), and to apply the maxim amounts to nothing other than to say the law regards the servant as consenting to existing conditions by continuing his service with knowledge of the conditions (that is, that he agrees to them and assumes them as a part of his contract). It has been doubted whether the maxim has any application where there has been a breach by a defendant of a statutory obligation. (*Baddeley* v. *Granville,* L. R. 19 Q. B. Div. 425; *Yarmouth* v. *France,* Id. 647; *Wilson* v. *Merry,* 19 L. T. (N. S.) 30.)

The passage of a law like that now under consideration implies that the class of employees for whose protection it was intended had not been able to protect themselves without it. Its object, as indicated by the title of the act, is to provide for the health, safety, and comfort of employees in factories, mercantile establishments, mills, and workshops in this state, and the authority for it is found in the police power of the state. The effect of it is to create a new situation in

the relation of master and servant, and to present the new question whether the doctrine of assumption of risk heretofore applied to that relation should apply in the same way to the new conditions. The duty of the master has been changed. He may no longer conduct his business in his own way. He may no longer use such machinery and appliances as he chooses. The measure of his duty is no longer reasonable care to furnish a safe place and safe machinery and tools, but in addition to such reasonable care he must use in his business the means and methods required by the statute. The law does not leave to his judgment the reasonableness of inclosing or protecting dangerous machinery, or permit him to expose to increased and unlawful dangers such of his employees as may be driven by force of circumstances to continue in his employ rather than leave it and take chances on securing employment elsewhere under lawful conditions. The guarding of machinery mentioned in the statute is a duty required of the master for the protection of his workmen, and he owes the specific duty to each person in his employ. To omit it is a misdemeanor subjecting him to a criminal prosecution. The necessity for such legislation is suggested by a consideration of a sentence from the opinion in the Knisley case which says: "There is no rule of public policy which prevents an employe from deciding whether, in view of increased wages, the difficulties of obtaining employment, or other sufficient reasons, it may not be wise and prudent to accept employment subject to the rule

of obvious risks." Notwithstanding the theoretical liberty of every person to contract for his labor or services and his legal right to abandon his employment if the conditions of service are not satisfactory, practically, by stress of circumstances, poverty, the dependence of his family, scarcity of employment, competition, or other conditions, the laborer frequently has no choice but to accept employment upon such terms and under such conditions as are offered. Under such circumstances, experience had shown, before the passage of the statute, that many employers would not exercise a proper degree of care for the safety of their workmen. The servant had to assume the risk of injury, and the master took the chance of a suit for damages. It was to meet this precise situation and protect employees in such situation that this legislation was adopted. It imposes upon the master an absolute, specific duty — one which he cannot delegate and against his neglect of which he ought not to be allowed to contract. If the employee must assume the risk of the employer's violation of the statute, the act is a delusion so far as the protection of the former is concerned. He is in the same condition as before it was passed. He is compelled to accept the employment; he must assume the risk; when he is killed or crippled, he and those dependent on him have no remedy, and the law is satisfied by the payment of a fine. The more completely the master has neglected the duty imposed upon him by statute for the servant's protection, the more complete is his defense for the injury caused by

that neglect. Justice requires that the master, and not the servant, should assume the risk of the master's violation of the law enacted for the servant's protection, and in our opinion this view is in accordance with sound principles of law."

Streeter had sued the Scraper Company for an injury received while in its employment resulting from the slipping of his hand so that it struck a rapidly revolving wood jointer, which was unguarded, resulting in the loss of three fingers. This was actionable under an Illinois statute requiring dangerous machinery to be fenced in.

Judgment in the Trial Court and in the Appellate Court had been for the company; but the Supreme Court reversed this decision and ordered a new trial.

Comment. This case marks a complete change in social philosophy and, one might say, if the new principle had not already been found in other contexts, a totally new legal principle. The entire case deserves close study, but we may note especially the old doctrine of risk as part of the law of master and servant to be based upon two things, viz.: (1) freedom of contract, a protection of the individual as an all important part of society and (2) *volenti non fit injuria*,[1] a highly abstract conception of individuals as ideally complete independent sovereignties, with which it was not the law's business to interfere.

The new type of law, Employer's Liability, is not opposed to the essential meaning of freedom of contract; but the reasoning of Judge Dunn here indicates that, under modern social conditions there is no real freedom

[1] Harm cannot be done to a man who willingly suffers it.

of the kind. While he does not specifically take up the question of police power, the cases presented under that title in the classification following the present one,[1] show us plainly that the paramount law today recognizes the necessity of protecting all individuals so far as possible and that the principle of *laissez-faire* is very much in disrepute. The modern doctrine of the police power of the state seems somewhat vague. In *Mitchell* v. *Reynolds* there is a more satisfactory particularizing of the person.

Food Adulteration

PLUMLEY *v.* MASSACHUSETTS

155 U. S., 461

A statute of Massachusetts provides as follows:

"No person by himself or his agents or servants, shall render or manufacture, sell, offer for sale, expose for sale or have in his possession with intent to sell, any article, product or compound made wholly or partly out of any fat, oil or oleaginous substance or compound thereof, not produced from unadulterated milk or cream from the same, which shall be in imitation of yellow butter produced from pure unadulterated milk or cream of the same; *provided*: That nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the customer of its real character, free from coloration or ingredient that causes it to look like butter."

[1] Cf. especially *Munn* v. *Illinois* and *State* v. *J. J. Newman Lumber Co.*

Proper penalties, etc., were provided and Plumley was convicted in the Municipal Court of Boston on the charge of having violated this statute on October 6th, 1891. He appealed on the ground, among other grounds, that the law was unconstitutional. Congress alone has the power to regulate commerce between states; and the article which he sold was a package of oleomargarine manufactured in Illinois by a firm of which he was the agent only. He sold the article in the original package which was properly marked in accordance with the act of Congress.

The court held that the statute of Massachusetts was not unconstitutional. Massachusetts is not regulating interstate commerce but has a perfect right to say what shall be sold within her own borders. The act of Congress relating to oleomargarine does not interfere with the exercise by the states of any authority they possess of preventing deception or fraud in the sales of property within their respective limits. The Massachusetts statute was aimed at deceit and fraud.

The judgment of the lower court was affirmed and Plumley fined.

A strong dissenting opinion on this case was given by Chief Justice Fuller, Justices Field and Brewer concurring. This opinion held that the possibility that the appearance of certain articles might deceive those who sought to purchase them, ought not to bar such articles from commerce.

Food Supply

The New York Globe, September 25, 1916.

Arthur Plaut, a director in the Brooklyn slaughtering establishment of Robert Plaut & Son, charged with bribing an official of the Health Department to pass the carcasses of tubercular cows for human consumption, was found guilty by a jury sitting before Judge Cropsey in Part III, Supreme Court, Brooklyn, on Saturday, the 23d.

This conviction was the first fruits of a long campaign directed against such dealings, by Alfred W. McCann and the New York Globe. The law against such dealings is plain — the more important part is the conviction of an offender.

New York Globe, January 29, 1916.

In the Supreme Court of New York State, a jury sitting before Judge Dugro found the *Globe* guilty of libel because of an article published over the signature of A. W. McCann.

The case grew out of the prosecution by the corporation counsel of a number of provision dealers for keeping rotten eggs. Many dealers were sent to the penitentiary. Armour & Co. and Swift & Co., both large dealers, had been heavily fined. In the article by McCann referred to he said: "Winfield H. Mapes, wholesale butter and egg merchant, etc., etc., was also convicted by the same court of trafficking in rotten eggs and heavily fined."

The case for the prosecution rested upon technical errors in the statement of McCann.

As a matter of fact Winfield H. Mapes was not convicted nor fined. It was the corporation Winfield H. Mapes & Co., of which he was president, which was convicted; and the charge was of "holding, keeping or offering for sale spot eggs under the provision of the sanitary code which provides as follows:

"Any spot eggs in possession of, or held, or kept or offered for sale by a dealer in food shall *prima facie* be deemed to be held, kept and offered for sale as human food."

Abundant proof had been produced that such eggs were sold in large quantities to bakers and were incorporated by them in pound cake.

The jury was instructed by Judge Dugro that the *Globe* having admitted its error in omitting *& Co.* from the name of the person accused, verdict must be rendered in favor of Winfield H. Mapes.

The jury gave him six cents damages. Counsel moved to set the verdict aside but the motion was denied.

Comment. Plumley v. *Mass., and Other Food Supply Cases.* The Plumley Case is doubly a security case. It comes under a statute which provides for the security of the public in the matter of pure food and the decision of the court confirms the security of the state of Massachusetts in looking after purely domestic affairs. The dissenting opinion seems to be based upon the principle of *caveat emptor.*

The *Globe* libel case is here included because, while technically it secures a firm against misrepresentation (with damages assessed at six cents), in reality it was a defense against impure food; and the newspaper account quoted implies the statute under which the attack was considered justifiable.

Health — Practicing Medicine

PUBLIC HEALTH LAW OF NEW YORK STATE

L. 1909, Ch. 49, Art. VIII

The practice of medicine is defined as follows: A person practices medicine within the meaning of this article, except as hereinafter stated, who holds himself out as being able to diagnose, treat, operate, or prescribe for any human disease, pain, injury, deformity, or physical condition, and who shall either offer or undertake, by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition.

There is a section which deals with the qualifications of medical practitioners, making very strict requirements.

Nuisance — Danger to Life

ANONYMOUS

Nisi Prius, 1699

(Reported 12 Modern, 342. Beale, 99, 3d ed.)

One was indicted for a nuisance for keeping several barrels of gunpowder in a house in Brentford town, sometimes two days, sometimes a week, till he could conveniently send them to London. Wherein *Holt, C. J.*, resolved:

First. That to support this indictment there must be apparent danger; or mischief already done.

Second. Though it had been done for fifty or sixty years, yet if it be a nuisance, time will not make it lawful.

Third. If at the time of setting up this house, in which the gunpowder is kept, there had been no houses near enough to be prejudiced by it, but some were built since, it would be at peril of builder.

Fourth. Though gunpowder be a necessary thing, and for defense of the Kingdom, yet if it be kept in such a place as it is dangerous to the inhabitants or passengers, it will be a nuisance.

Comment. The fourth point made by Justice Holt contains the kernel of our nut. It could be made only in a constitutional realm. Gunpowder is necessary for the defense of the kingdom — but that is no reason for endangering the lives of constituent members of that king-

dom. It is assumed that it could be kept where it would not endanger life — at least in time of peace. In time of war, government needs come first, whatever the danger to individuals.

Cf. the Kingsland and Haskell, N. J., cases in 1916 where enormous damage to property was done, but very little loss of life occurred. The Canadian Car Co., at the former place, had enjoined the authorities from interference with their plant.

Public Safety — Explosives

New York Times, Summer of 1916.

Following the immensely destructive explosion at Black Tom pier, caused by the storage of large quantities of munitions ready for shipment to the war in Europe, the Board of City Commissioners of Jersey City passed regulations forbidding the shipment of high explosives into or from Jersey City. The embargo which was passed was sweeping in character and was framed so as to end for all time the utilization of the port facilities of Jersey City for the handling of high explosives.

On August 10th, Federal Judge Rellstab of Trenton granted a temporary injunction restraining the authorities of Jersey City from enforcing these regulations.

Judge Rellstab held that there cannot be two sources of power to regulate the same thing. The control of interstate commerce is vested exclusively in the Federal Government through its proper agent, the Interstate Commerce Commission. If the municipality of Jersey

City has a grievance the proper place to take that grievance is to the commission.

The Deputy Commissioner of Public Safety of Jersey City said that the city would obey the injunction and would not interfere with the passage of explosives through the city; but it would prevent the storage of explosives in the city and would see to it that any shipments hauled into Jersey City were immediately transferred to ships in the harbor or to points outside the city limits. (*Times,* Aug. 11, 1916.)

The regulation of the sale and storage of explosives within the harbor of New York, whose limits extend to the Jersey shore, was formerly provided for under the State Fire Marshal's law. This department had been recently discontinued.

Comment. Various aspects of security are here represented:

1. Desire of authorities of Jersey City to protect their citizens.
2. Desire of representatives of the Federal power not to have it tampered with.
3. Yielding to authority on the part of municipal officers but assertion of sovereignty within their own field.

Carrying Concealed Weapons

Section 1897 of the Penal Code of the State of New York:

"A person who attempts to use against another, or who carries or possesses, any instrument or weapon, of the kind commonly known as a black-jack, slungshot,

billy, sand club, sand bag, metal knuckles, bludgeon, or who, with intent to use the same unlawfully against another, carries or possesses a dagger, dirk, dangerous knife, razor, stiletto, or any other dangerous or deadly instrument or weapon, is guilty of a misdemeanor, and if he has been previously convicted of any crime, he is guilty of a felony.

A person who carries or possesses a bomb or bombshell, or, who with the intent to use the same unlawfully against property or person of another, carries or possesses any explosive substance, is guilty of a felony.

Any person under the age of sixteen years, who shall have, carry, or have in his possession, any of the articles named or described in the last section, which it is forbidden therein to offer, sell, loan, lease or give to him shall be guilty of juvenile delinquency.

Any person under the age of sixteen years, who shall have in his possession in any city, village or town of this state, any pistol, revolver or other firearm of a size which may be concealed upon the person without written license therefor, issued to him as hereinafter prescribed, shall be guilty of a misdemeanor, and if he has been previously convicted of any crime he shall be guilty of a felony."

New York Evening Post, January 10, (?) 1912

Mrs. Margaret M. had been charged with homicide by wilful neglect, in connection with the death of her daughter, Kathryn, 5 years old, of diphtheria on Thanksgiving Day.

The hearing was before Coroner Shongut and the jury, composed largely of prominent business men, based its action on the view that ignorance of the accused mother did not constitute " wilful neglect."

The jury found, nevertheless, that failure to call a regular physician had caused the child's death, and urged the pressing of the pending cases against Christian Science practitioners, and the strengthening of the law in such matters if the laws in force were not adequate.

Another daughter had been attacked by the same disease and quarantined. Two Christian Science practitioners attended the child who died.

New York Herald, November 12, 1914.

Mrs. Flower, wife of Dr. R. C. Flower, an imprisoned swindler, pleaded guilty to having attempted to smuggle morphine to her husband in the Tombs. She was sentenced to sixty days in the workhouse.

Captain Thomas McEnery, of Texas, received a suspended sentence on the same charge.

II. SECURITY IN PRESERVATION OF PROPERTY

Attacks upon Credit (a) Forgery

REGINA *v.* CLOSS, 1857

(Reported Dears, and B. C. C., 460. Beale, 837, 3d ed.)

The prisoner was tried for the forgery of a copy of a painting, on which he painted the signature "John Linnell."

Forgery is defined to be the fraudulent making or alteration of a writing, to the prejudice of another's rights. In the case of a written instrument, the forgery of the signature is really the forgery of the whole instrument, and is always so laid in the indictment. Unless, therefore, an indictment would lie for the forgery of a picture, this count cannot be supported. (There were other counts in the indictment, one for obtaining money by false pretences, upon which he was acquitted, another for a cheat at common law. The court held that the prisoner could have been convicted as a cheat if the indictment had been properly framed.)

A forgery must be of some document or writing; and this was merely in the nature of a mark put upon the painting with a view to identifying it, and was no more than if the painter put any other arbitrary mark as a recognition of the picture being his.

Conviction quashed.

Comment. This case is given as an indication of the technical and meticulous character of the decisions in first cases. It is exceedingly doubtful if any such decision would be made today.

Counterfeiting

By the ancient common law (11 Cyc. 302) making counterfeit coin of the realm was treason and subsequently a felony (*U. S.* v. *Coppersmith,* 4 Fed. 198); and passing, having in possession with intent to pass as true, and procuring with such intent, having in possession an instrument for counterfeiting current coin and procuring an instrument with intent to use in making foreign coin, were misdemeanors.

In the United States the Federal Penal Code (Secs. 147–178) provides that "whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States, shall be fined not more than five thousand dollars and imprisoned not more than fifteen years.

Smaller penalties, but still severe ones, are provided for similar offenses against banking associations authorized by the state. Knowledge is a necessary element and various acts have been passed making it clear that any attempt, no matter how shrewdly planned, to evade the provisions of the section cited above will be counted to be counterfeiting and duly punished. There are innumerable cases under these statutes but no new principle.

REX *v.* SUTTON, 1736

HARDWICKE, 370

The defendant had in his custody certain iron stamps each of which would make or impress the figure of one of the sceptres impressed upon half guineas. He was believed to have intended to stamp these upon sixpences, to color them the color of gold and fraudulently utter them: "against the peace of our Lord the King, his crown and dignity." He further had in his possession one such piece.

For the defendant it was argued that the common law takes no notice of a bare intention, as a crime, unless coupled with some overt act.

Lee, J., — "It is certain that a bare intention is not punishable; and yet when joined with acts whose circumstances may be tried, it is so . . . In this case the indictment is for unlawfully having in his custody stamps capable of making impressions of sceptres, with the intent to make such impression; now the statute of 8 & 9 Will. III (c. 26) has considered the having as an act, for, by the statute, it is high treason to have (knowingly) any instrument, etc., in his possession. . . . the only act capable of trial in the offense against the statute is the having in possession. All that is necessary in this case is an act charged, and a criminal intention joined to the act."

The court gave judgment that the defendant do stand in the pillory at Charing-Cross; and in con-

sideration of his poverty and long imprisonment hitherto, that he do pay a fine of 6s. 8d. and be imprisoned for six months.

Comment. This is extremely important as showing the border line between an act and an intent, just the place where the unpunishable intent passes over into an act, the act here being created by statute, viz.: the having in possession. The undoubted intent joined to this made an indictable offense.

False Entry

New York Times, September 26, 1913.

President Wilson pardoned today Charles A. Isaacs, sentenced at Fort Dodge, Iowa, June 20 last to five years in the penitentiary for making false entries in the books of the Forest City National Bank, of which he was cashier. Strict compliance with the law by Isaacs, it is asserted, would have wrecked the bank by divulging its condition to the public, whereas the false entries, covering excessive loans to a stockholder of the institution until he could realize on farm land transactions, resulted in no loss.

It was represented to the President that Isaacs acted under the domination of a superior officer. Sentence had been suspended, pending the President's action on the recommendation of the trial judge and prosecuting attorney for a pardon.

Comment. This is an instance wherein a strict adherence to the letter of the law would have worked substantial

injustice. It is rare to find a trial judge, the prosecuting officer and the pardoning power unanimous that it is so. And yet it is unlikely that the law will be changed, for this case was exceptional. Ordinary violations of the law will still be punished.

Interference with Mails

UNITED STATES *v.* AGLER

62 Fed. Rep., 824. Circuit Court, D. Indiana, 1894

(Taken from the opinion of District Judge Baker)

Prior to the 2nd day of July, 1890 . . . the United States, as a municipal corporation, had no power . . . to go into the Courts of Equity of the United States, and invoke the aid of those courts, by their restraining power, to prevent interference with the carriage of the mails or with the carriage of interstate commerce. Prior to that time the sole remedy was on the criminal side of the court. The sole method in which the United States, as a government, could prosecute violators of the law who interfered with the carriage of mails or interfered with the instrumentalities used in the conduct of interstate commerce, was by indictment or information on the criminal side of the court; but the growth of railways in this country and the combinations of laborers employed on those roads for the purpose of enforcing, by strikes or otherwise, what they conceived to be their just rights, had led to a condi-

tion of things that, in the judgment of Congress, made it imperative that the courts of the United States — in other words, that the nation itself — for the purpose of protecting the mails of the country, and for the purpose of protecting the passenger and freight traffic on interstate railroads, should have the right to invoke not only the criminal jurisdiction of the court by fines, or by sending to the penitentiary those who were guilty of violations of those laws, but that the government should also be clothed with the power — or rather that the courts of the United States should be clothed with the power — of laying their strong hands on these men, and not waiting until the crimes had been committed, but restraining, not for the purpose of preventing people from doing what is lawful, or to prevent their getting better wages, but for the purpose of saying to everybody that civil liberty cannot exist where combinations of men undertake by force and violence to arrest the peaceable and orderly conduct of business among the States."

It was the opinion of Judge Baker that the above considerations led to the passage of the law of July 2nd, 1890, which gave to the courts of the United States enjoining power.

Comment. Note that we have not here a decided case; but rather the interpretation by a United States Judge of a statute which gives the law plainly, viz. — that there may not be interference with mails in any violent or disorderly fashion.

Congress represents the nation itself but through the courts and constitutional restrictions. Many acts of Congress have been declared unconstitutional and other acts, designed to serve the same purpose but more adroitly worded, have been passed in their stead which have been called constitutional. Constitutional machinery moves slowly and is usually far behind public opinion, but it is the only sure index of a public opinion which is more than ephemeral.

Blue Sky Laws

New York Times, 1916–17.

The so-called " blue-sky " laws, which would provide for the licensing of dealers in stocks, bonds and other securities and make other regulations, have been enacted in twenty-seven states. The legislation has been consistently opposed by the Investment Bankers' Association and many of these laws have been declared unconstitutional.

On January 23, 1917, the Supreme Court of the United States upheld the " blue sky " laws of Ohio, Michigan and South Dakota regulating the sale of securities. Justice McKenna handed down the opinion of the Court to which Justice McReynolds alone dissented. They admit that such statutes may curb and burden legitimate business, but hold that the interests of legitimate business are not paramount to the police power of states to protect their citizens from fraud. Federal Court injunctions suspending enforcement of the laws are dissolved.

Model Law is Upheld

The laws do not attempt to prohibit unwise investments, but give state authorities, through security commissions or banking superintendents, authority to forbid the sale within state borders of securities which officials believe would result in fraud upon investors. The Michigan and South Dakota statutes were patterned upon the "model" blue sky bill drafted by the National Association of Attorneys General, which is the model for the laws of several other states.

That securities are instrumentalities of commerce and, as such, exempt from state regulation and subject to national supervision, was the principal contention of the bankers, stock salesmen and corporations attacking the laws.

States have Protective Rights

"Prevention of deception is within the competency of government," said Justice McKenna. "The intangibility of securities, being representatives of property in distant states, and the integrity of them can only be assured by the probity of the dealers in them and the information they are required to give. This assurance the states deemed necessary for their welfare to require, and that requirement is not unreasonable or inappropriate.

"We cannot stay the hands of government upon a consideration of the impolicy of its legislation. Every

new regulation of business meets challenge. But the policy of a state and its expression in laws must vary with circumstances.

"The statutes burden honest business, it is true, but burden it only that under its forms dishonest business may not be done. Expense may thereby be caused and inconvenience, but to arrest the power of the state by such considerations would make it impotent to discharge its functions. It costs something to be governed."

Miscellaneous — (b) Rebating

This is forbidden by Sec. 8564 U. S. Comp. St. 1913 (Act Feb. 4th, 1889) and by Sec. 8597 (Act Feb. 19th, 1903). Common carriers cannot either directly or indirectly "by any special rate, *rebate,* drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, in the transportation of passengers or property . . . than it charges, demands etc., from any other" for like services. This is discrimination and the offender is liable to imprisonment in the penitentiary for a term not exceeding two years and to a fine of not less than one thousand nor more than twenty thousand dollars.

Conspiracy in Business

DENVER JOBBERS' ASSOCIATION *v.* PEOPLE

COURT OF APPEALS OF COLORADO, 1912

(122 Pacific Reporter, 404. 112 Bul. Lab. St., 123.)

This was an action against the Denver Jobbers' Association, the Denver Retail Grocers' Association, and the Retail Merchants' Association of Colorado to destroy a combination tending to monopoly in restraint of trade. These associations were made up of wholesale and retail dealers in groceries and food products, and by their agreements had so fixed the prices of goods and so controlled the marketing of them that the price of necessities had been increased to all the people of the State of Colorado. Dealers not in good standing were not allowed to secure goods until the differences had been adjusted, and boycotts of recalcitrant dealers were maintained, to the destruction of competition and to the injury of the people.

The principles of combination and coöperative action are involved; and the decision was rendered on the basis of the common law. The defense contended that by a section of the Revised Statutes of Colorado, the combination of workmen for lawful purposes established a principle in favor of combination.

Judge Scott said:

"But that statute expressly limits such combinations to lawful purposes and particularly mentions some of the unlawful purposes for which such combinations may not be permitted, among which are 'financial injury,' 'preventing or intimidating any other person from continuing in such employment as he may see fit,' or 'the boycott,' all of which unlawful acts may well be considered as within the allegations of the complaint in the case at bar."

He further said that if the statute were construed as the defendants contended, it would be void, as the legislature could not grant the right of combination of the nature charged in the complaint before the court, since the right of freedom of trade belongs to every citizen and must not only be protected by the courts but is beyond the power of the legislature to deny.

The discussion of this phase of the question was exhaustive, and at its conclusion Judge Scott said:

"From this examination and review of the authorities cited and from the authorities in such cases cited and relied on, it would seem that the conclusion is clearly and overwhelmingly supported that at the common law conspiracies and combinations of the character of the case at bar are unlawful, and unlawful in the sense that they may be restrained in a court of equity at the suit of the attorney general on behalf of the people, and that the conspirators are subject to criminal indictment. And this without the aid of a so-called anti-trust statute, for these are but a reiteration of the common law upon that subject."

Comment. This is another "restraint of trade" case, based upon the kind of security to be assured to the community and its constituent members, having in mind an individualist social philosophy. Still, Judge Scott recognizes by implication that there are combinations which are lawful. The doctrine of natural rights here propounded has a musty odor. It needs ventilating.

Strikes and Picketing

HARDIE–TYNES MFG. CO. *v.* CRUSE

SUPREME COURT OF ALABAMA, 1914

(66 Southern Reporter, 657. 189 Bul. Lab. St., 158.)

The company named brought a bill to secure an injunction against W. D. Cruse and others. The bill of complaint sought relief against certain of the complainant's former employees, members of the Molders' Union, who in coöperation with the union had engaged in a general strike against their employers, including this company. It charged concerted action to coerce the employers to agree to their terms, and to prevent the employers from employing other members of the union in their places. An elaborate system of picketing and patrolling, and intimidation, threats, insults, and in some cases violence were charged. Large pecuniary damages and a probability of the continuance of the acts were alleged, and the bill prayed for an injunction covering all the practices complained of. The

respondents objected to the bill on the ground that it was without equity and was multifarious.

In delivering the opinion of the supreme court, which reversed the chancellor's decree in favor of the respondent members of the union, and overruled their objections to the bill of complaint, Judge Somerville said in part:

"The English and American courts have, we believe, without exception, held that the right to conduct one's business, without the wrongful and injurious interference of others, is a valuable property right which will be protected, if necessary, by the injunctive processes of equity.

"They seem to be unanimous, also, in holding that employees may rightfully organize themselves into associations for mutual protection and betterment; and that, having thus organized, they may by confederated action withdraw from, or decline to enter, the service of any particular employer. And it may be further said that there is practically no judicial dissent from the proposition that in the accomplishment of their purposes of self-protection and self-betterment employees or non-employees have no right to use threats, intimidation, or violence against or upon employers, or upon their employees or strangers, to induce them to leave or not to enter the service of the former.

"With respect to the 'peaceful persuasion' of others not to enter an employer's service, it may, perhaps, be said that such a right is generally recognized by the

courts, and injunctive relief against it is denied, though it is to be noted that interference with existing contracts of service by inducing those so contracting to violate their agreements is such a wrong as may be enjoined in equity.

" Picketing and peaceful persuasion must not interfere with a lawful business. Peaceful interference by persuasion or picketing can hardly exist.

" It is suggested by counsel for respondents that our construction of section 6395, as being an inhibition of picketing even where threats of violence are not used, renders it unconstitutional. No intimation is offered as to what provision of the constitution is thereby offended and we can think of none. Certain it is that a right to actively and directly interfere with and prevent the lawful business of another is not included among the inalienable rights of ' life, liberty and the pursuit of happiness! ' The ' liberty ' guaranteed by the Constitution (Art. 1, Sec. 1) is liberty regulated by law and the social compact; and in order that all men may enjoy liberty it is but the tritest truism to say that every man must renounce unbridled license. So, wherever the natural rights of citizens would, if exercised without restraint, deprive other citizens of rights which are also and equally natural, such assumed rights must yield to the regulations of municipal law. If one man asserts the constitutional right of preventing another from the pursuit of a lawful business, what is to become of the undoubted constitutional right of that other to pursue his business unmolested? It is

clear that this notion of liberty utterly ignores 'the other fellow,' and denies to him the very freedom it is claiming for itself."

Comment. Judge Somerville's statement, that "a right to actively and directly interfere with and prevent the operation of the lawful business of another is (certainly) not included among the inalienable rights of 'life, liberty and the pursuit of happiness,'" is an indication of the prevailing character of judicial decision until very recent days. The general subject is discussed illuminatingly in the Harvard Law Review for January, 1917, by Dean Pound. The security sought here by the court on behalf of the manufacturers is in no necessary conflict with the security sought by the strikers. As Dean Pound has said, there need be no accusations of corruption against courts because of such decisions. Members of courts, as well as the greater part of educated men everywhere, are still under the dominion of Eighteenth Century individualism and can see no impropriety in such decisions, if indeed there be any. This is not a work of special pleading and I simply call attention to the fact that the decision, mistaken or not, was in the interest of property security, from the point of view of the court. That alone is of interest in this connection. Justice White, in the Standard Oil Case, in his somewhat lengthy and involved sentence, has really stated this, in effect. Restraint of competition must not be *unreasonable* and to be actionable it must be *intending wrong* to the general public — all of which is fairly obvious. In *Distilling, etc.* v. *People* "the contravention of well established principles of public policy" is given as the ground of illegality. This is a mantle as broad as charity but there can be no doubt that the change in public policy is due primarily, not to any philanthropic motive nor to any desire to curb

freedom of action, but solely to the exigencies of the state. It has been found to militate against public security to leave workmen to fight their battles unaided against the negligence or criminality of employers whose employment they must seek or starve.

Inventions, Patents, Etc.

AMERICAN STAY CO. *v.* DELANEY

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1912

(91 Northeastern Reporter, 911. 112 Bul. Lab. St., 142.)

The company named sought to restrain John S. Delaney, a former employee, from using or disclosing certain trade secrets relating to the conduct of its business. The machinery used by the company was for the most part not patented, having been devised by the president of the company, and was used by it with secret processes and formulas in the production of leather welting which had gained a wide reputation. Delaney was a mechanic of unusual ability, and had assisted in perfecting his employer's machinery and had also devised machines of his own invention for the manufacture of a product similar to that put forth by his employer's establishment. The superior court of Suffolk County refused to restrain Delaney from using the machinery of his own devising, but found that he had employed a portion of the time belonging properly to his employer to further his own interests, and allowed a recovery in this behalf. The company thereupon

appealed, seeking to secure the injunction to prevent Delaney from engaging in the business, but in this was not successful, the judgment of the lower court being affirmed.

Judge Braley, speaking with relation to the use of trade secrets, said:

"It is elementary that if the proprietor in connection with his business invents, or discovers, and keeps secret, processes of manufacture, which enable him to produce goods at a less cost, or of more meritorious quality than his competitors, his right to the invention or discovery is not exclusive as against the public, or persons whose knowledge of it has been lawfully obtained. It is a monopoly only while he retains control, and can prevent publication (*Chadwick* v. *Covell,* 151 Mass. 190, 191, 23 N. E. 1068; *Gayler* v. *Wilder,* 10 How. 477, 493, 13 L. 504). But if in violation of his contract of employment, where, although not expressly stipulated, he impliedly agreed not to divulge the plaintiff's art and unpatented inventions, the defendant either individually, or jointly with others to whom they were improperly disclosed, undertook in the production of welt to use and apply them, a court of equity while enjoining the continuance of such interference, and further disclosure, will give relief by the assessment of damages for any injury already inflicted." (Cases cited.)

As to the ownership of inventions perfected by an employee he said:

"The defendant being of unusual ability developed

great mechanical skill while in the plaintiff's service, and with the understanding that the plaintiff believing its undisclosed methods to have been very successful desired him not to impart any information of their existence, gave valuable aid to the president in the development of his inventions, which became the property of the company. He was not, however, employed to originate inventions for the plaintiff's benefit, and while he could not appropriate his employer's trade secrets in whatever form they may have consisted, no obligation rested upon him to forego the exercise of his inventive powers, even if they were incited because of knowledge necessarily derived from the performance of his contractual duties. It was legitimate for him under these conditions to invent and perfect improvements which were embodied in new machines of greater capacity and efficiency."

The injunction sought, to restrain Delaney, was dissolved; but the plaintiff was granted $250.00 with interest as compensation — but he was allowed no costs.

Comment. A double form of security is here established. — Right of an inventor to the product of his own skill and right of an employer to the full services of an employee.

Personal — (c) Adultery

Among the Greeks and in the earlier period of Roman Law, it was not adultery unless a married woman was

the offender. The foundation of the later Roman law with regard to adultery was the *lex Julia de adulteriis coercendis*. In Great Britain it was reckoned a spiritual offense, that is, cognizable by the spiritual courts only. The common law took no further notice of it than to allow the party aggrieved an action for damages. In England, however, the action for "criminal conversation," as it was called, was nominally abolished by the Matrimonial Causes Act, 1857; but by the 33d section of the same act, the husband may claim damages from one who has committed adultery with his wife in a petition for dissolution of the marriage or for judicial separation.

The husband's adultery must be either incestuous or bigamous to be ground for divorce.

In some of the United States of America adultery is a criminal offense with imprisonment in the penitentiary as punishment. (Encyc. Brit. Art. Adultery.)

Divorce — Encyc. Brit. Art. — Divorce.

"The ground pleaded for a divorce is seldom an index to the motives which caused the suit to be brought. This is determined by the character of the law rather than by the state of mind of the parties; and so far as the individuals are concerned, the ground alleged is thus a cloak rather than a clue or revelation. Still those causes which have been enacted into law by the various state legislatures do indicate the pleas which have been endorsed by the social judgment of the respective communities." W. W. Willcox.

Seduction

HAMILTON *v.* LOMAX

SUPREME COURT, NEW YORK, 1858

(26 Barbour, 615. Ames, 94.)

The courts have been careful to keep seduction and breach of promise of marriage separate. In a case for seduction it was held to be erroneous to admit evidence of a promise of marriage, in attempting to prove the seduction. No person seduced can maintain an action for such seduction because the person seduced assents thereto. The only mode in which the action has ever been maintained has been by bringing such action in the name of some person having a right to the services of the person seduced, and allowing damages to be recovered, not only for actual loss of service, but for a sum sufficient also to punish the seducer; but such action can never be maintained in the name of the party seduced.

Comment. This is another case of the persistence of the opinion that individuals in any society occupy the position toward one another of independent sovereigns whose dealings with one another's wills cannot be interfered with in any way whatsoever. But interference with a man's property right in a woman is another story. The seduction is her own affair; her reduction in value to an "owner" is the state's affair.

Reputation — (d) Libel

REX *v.* TIBBITS

COURT FOR CROWN CASES RESERVED, 1901

(Reported, 1902, 1 K. B., 77. Beale, 56, 3d ed.)

There were two defendants in this case, Tibbits and Windust. The charges contained in the indictment related to the publication of certain matters in a newspaper called the *Weekly Dispatch,* particularly in certain issues of it which were named. Prior to the publication of the first article two persons named Allport and Chappell had been charged with cruelty to children and attempted murder. These were found guilty and sentenced to penal servitude, the first for fifteen years and the second for five years; but during the course of the trial, " the publication went far beyond any fair and *bona fide* report of the proceedings before the magistrate. They (the articles) contained, couched in a florid and sensational form, a number of statements highly detrimental to Allport and Chappell."

" It was not attempted to be argued by Mr. Foote, who appeared as counsel for both defendants, that the publication of such articles was lawful, and that the persons publishing such articles could not be punished. On the contrary, he contended that the publication of such articles was a contempt of court, and could only properly be punished as such either by summary pro-

ceedings or indictment for contempt. He further urged that there was no evidence of any intention on the part of either of the defendants to pervert or interfere with the course of justice, and that any inference which might otherwise be drawn from the contents of the articles, that they were calculated to pervert or interfere with the course of justice, was negatived by the fact that the defendants Allport and Chappell had been subsequently convicted."

Lord Alverston, C. J., held that there was no doubt that the publication of such articles constituted a contempt of court and could be punished as such, but he said: "We think that the facts, which bring the incriminated articles within the category of misdemeanor, abundantly appear . . . and that it is perfectly immaterial whether the articles be described and charged as libels or contempts or not. With reference to the argument that there was no evidence of any intention to pervert the course of justice, we are clearly of opinion for reason given (Many authorities had been cited. G.C.C.), that this is one of the cases in which the intent may properly be inferred from the articles themselves and the circumstances under which they were published. . . . The essence of the offense is conduct calculated to produce an atmosphere of prejudice in the midst of which the proceedings must go on. Publications of that character have been punished over and over again as contempts of court, where the legal proceedings pending did not involve trial by jury, and where no one would imagine that the mind of the

magistrates or judges charged with the case would or could be induced thereby to swerve from the straight course. The offense is much worse where trial by jury is about to take place. . . ." "If the articles are, in the opinion of the jury, calculated to interfere with the course of justice or pervert the minds of the magistrate or of the jurors, the persons publishing are criminally responsible." (Conviction affirmed.)

Comment. Intention to damage reputation was proven and there was direct interference with the function of the court, in the opinion of the court. We cannot review the facts and usurp the function of the Chief Justice, but it is to be noted that "the publication of proceedings publicly held in a court of justice, if fair and accurate, has now the protection of law." This case is equally significant for the security of courts.

Libel

THORLEY *v.* LORD KERRY

In the Exchequer Chamber, May 9, 1812

(Reported in 4 Taunton, 355. Beale, 3d ed., p. 403.)

There was an "action for libel contained in a letter addressed to Lord Kerry, and sent open by one of his servants, who became acquainted with its contents. The libel charged his Lordship with being a hypocrite, and using the cloak of religion for unworthy purposes." The defendant was found guilty and the plaintiff was given £20 damages.

By a writ of error the case was brought to the Exchequer Chamber and *Mansfield, C. J.*, delivered the opinion of the court. Referring to the letter, he said, "There is no doubt that this was a libel, for which the plaintiff in error (defendant in the original suit) might have been indicted and punished; because, although the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt and ridicule."

Libel — or Near Libel

New York Evening Post, January (8?), 1912.

A jury in the Supreme Court awarded a verdict of $10,000, the full amount asked, to Mrs. Florence Crews Jones, after trial of her suit against James L. Perkins, a publisher. Mrs. Jones, who is a translator, contended that the publisher had used her name, unauthorized by her, in a book of short stories by Guy de Maupassant. Eight improper stories were inserted against her knowledge and consent, she said.

Basing her complaint on the "personal privilege law," which was passed to protect an individual against the use of his or her name for profit by another without the owner's consent, Mrs. Jones testified that she was "horrified" when she opened one of the books and saw eight grossly improper, poorly translated stories, with which she had had nothing to do, published under her name as translator. Thereafter she

was deluged with letters and telephone messages from friends, expressing their surprise that she should translate such stories. She said she demanded of the defendant that he alter the book at once, but he told her that she would have to wait until the second edition came out. The second edition was identical with the first.

III. PUBLIC ORDER (DECENCY)

Decency in Respect for Religion

TAYLOR'S CASE

KING'S BENCH, 1676

(Beale, 51, 3d ed.)

The defendant had uttered " divers blasphemous expressions horrible to hear." He had abused the character of Jesus Christ, had said that religion was a cheat and that he feared neither God, devil nor man.

Several witnesses testified to the utterance of these words. *Hale* said: " That such kind of wicked blasphemous words were not only an offense to God and religion, but a crime against the laws, state and government, and therefore punishable in this court (for to say religion is a cheat, is to dissolve all those obligations whereby the civil societies are preferred); and that Christianity is parcel of the laws of England, and

therefore to reproach the Christian Religion is to speak in subversion of the law."

Judgment was given that he should stand in the pillory in three several places, pay one thousand marks fine and find sureties for good behavior during his lifetime. (Cf. *State* v. *Williams*, 4 Ire. (N. C.) 400.)

PEOPLE *v.* RUGGLES

Supreme Court of New York, 1811

(Reported 8 Johns, 290. Beale, 85, 3d ed.)

"Indictment for blasphemy.[1] After conviction the record was removed to the Supreme Court. Wendell, for the prisoner, now contended that the offense charged in the indictment was not punishable by the law of this state, though, he admitted, it was punishable by the common law of England, where Christianity makes part of the law of the land on account of its connection with the established church.

Kent, C. J.: And why should not the language contained in the indictment be still an offense with us? There is nothing in our manners or institutions which has prevented the application or the necessity of this part of the common law. . . . The people of this state, in common with the people of this country, profess the general doctrines of Christianity, as the rule of

[1] The facts in this case are not given in the report but they may be inferred from the judgment. *Author.*

their faith and practice. . . . Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful. . . . Things which corrupt moral sentiment, as obscene actions, prints and writings and even gross instances of seduction, have, upon the same principle, been held indictable. . . . No government of antiquity, and none of the governments of modern Europe (a single and monitory case excepted [1]) ever hazarded such a bold experiment upon the solidity of the public morals, as to permit with impunity, and under the sanction of their tribunals, the general religion of the community to be openly insulted and defamed. The very idea of jurisprudence with the ancient law-givers and philosophers embraced the religion of the country.

The free, equal, and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right."

Chancellor Kent further shows that there is no such obligation to defend Mahomet or the Grand Lama from similar attacks, since their religion is not that of this country. He somewhat naïvely assumes them to be superstitious as well!

[1] Query. Did Chancellor Kent perhaps refer to the then recent repudiation of religion during the French Revolution? *Author.*

Comment. The broad ground taken here is that the general sense of decency of any community may not be outraged with impunity on the principles of the Common Law. Taylor's Case (1676) is probably one of the authorities upon which Chancellor Kent relied. Justice Hale there had an evident bulwark in the fact that Christianity was "parcel of the laws of England;" but his other reason, viz.: "for to say religion is a cheat is to dissolve all those obligations whereby the civil societies are preferred" is less grounded both in law and in philosophy. Laws against blasphemy are on many statute books but their aid is seldom invoked against blasphemies and still more rarely enforced today. Christianity is not a part of the law of the United States; nor is any religion. Doubtless blasphemy would be punished today if committed in certain places — such as assemblies of Christians — but the charge would almost certainly be that of a breach of the peace. The utterance of remarks which would be considered as blasphemous by the greater part of our population, would nevertheless be permitted in many places, even public places. Compare the progress of freedom of speech and of the press. The public order is now little connected with any theological belief whatever.

STATE *v.* LINKHAW

Supreme Court of North Carolina, 1873

(Reported 69 N. C., 214. Beale, 87, 3d ed.)

"*Settle, J.* The defendant is indicted for disturbing a congregation while engaged in divine worship, and the disturbance is alleged to consist in his singing,

which is described to be so peculiar as to excite mirth in one portion of the congregation and indignation in the other.

From the evidence reported by his honor who presided at the trial, it appears that at the end of each verse his voice is heard after all the other singers have ceased, and that the disturbance is decided and serious; that the church members and authorities expostulated with the defendant about his singing and the disturbance growing out of it; to all of which he replied 'that he would worship his God and that as a part of his worship it was his duty to sing.' It was further in evidence that the defendant is a strict member of the church, and a man of most exemplary deportment.

"'It was not contended by the state upon the evidence that he had any intention or purpose to disturb the congregation, but on the contrary, it was admitted that he was conscientiously taking part in the religious services.'

"This admission by the State puts an end to the prosecution. It is true, as said by his honor, that a man is generally presumed to intend consequences of his acts, but here the presumption is rebutted by a fact admitted by the State.

"It would seem that the defendant is a proper subject for the discipline of his church, but not for the discipline of the courts."

Comment. The defendant was acquitted because, however unseemly his conduct, it was in good faith and without any desire to disturb either public order or private worship.

Decency

STATE *v.* BALDWIN

NORTH CAROLINA, 1835

(Beale, 27, 3d ed.)

The defendants had "assembled at a public place and profanely and with a loud voice, cursed, swore and quarreled, in the hearing of divers persons, and it is alleged, that by means thereof a certain singing school then and there kept and held was broken up and disturbed." The trial court acquitted the defendants, the state appealed and *Gaston, J.*, in the Supreme Court refused to disturb the verdict. His grounds for decision were that this was a single act, not habitual, — "it is possible that a frequent and habitual repetition of acts which singly are but private annoyances may constitute a public nuisance" . . . and that while the persons in the singing school may have been disturbed, "the loss of instruction, etc. — does not very gravely influence the good order or enjoyment or convenience of the citizens in general, so as to call for redress on the complaint of the state."

Inciting to Murder and Rebellion

PEOPLE *v.* JOHN MOST

NEW YORK 71 APP. DIV., 160

The defendant had published in New York City, in a paper called *The Freiheit*, which had a circulation of about 3000 extending into foreign countries, an article first published by another person over fifty years before, which characterized government as "nothing less than murder dominion" and called upon the adherents of anarchy "to execute judgment" by killing "through blood and iron, poison and dynamite" the heads of nations. After characterizing the rulers of countries as despots, it proceeded to characterize them as follows: "They are in human society what the tiger is among animals; to spare them is a crime; as despots permit themselves everything, . . . betrayal, poison, murder, etc., in the same way all this is to be employed against them. Yes, crime directed against them is not only right, but it is the duty of every one who has an opportunity to commit it, and it would be a glory to him if it was successful."

McLaughlin, J., in his opinion declared that the promulgation of such unnatural and outrageous doctrines in this state of civilization "seriously endangers" the public peace. . . . Every civilized nation heretofore has existed, and hereafter must exist, if at all, by the enforcement of law. Its recognition and enforce-

ments are the safeguards of the state. . . . Without it, chaos reigns and brute force becomes substituted for right.

Whoever openly or secretly advocates the resort to force for the accomplishing of any purpose, or the righting of any wrong, either real or imaginary, seriously endangers the public peace, etc. (This opinion is greatly condensed but given in the words of the Justice.) Most was found guilty of a misdemeanor, under section 675 of the Penal Code, of that date, and sentenced to be imprisoned in the penitentiary for one year.

Comment. The judge's opinion is sufficient comment on this case inasmuch as it states very clearly the grounds upon which anarchists *who take any action* will be punished. Such action is treason, though not formally declared to be such. This case is applicable to the Liberty classification of Free Speech also.

Decency

REX *v.* LYNN

King's Bench, 1789

(Beale, 88, 3d ed.)

This was a case of body snatching. The defendant's counsel contended that the case should be taken to the ecclesiastical courts — but the court held that the offense was contrary to good morals and highly indecent; the circumstance that the body was to be

used for purposes of dissection does not make it the less an indictable offense.

The defendant was fined but five marks, it being thought probable that he had acted in ignorance.

COMMONWEALTH *v.* SHARPLESS

Supreme Court of Pennsylvania, 1815

(Reported 2 Sergeant & Rawle, 91. Beale, 90, 3d ed.)

This was an indictment against Sharpless and others for exhibiting an indecent picture.

It was denied that even a public exhibition of an indecent picture was an indictable offense. The facts were granted and judgment was given against the defendants but they made this objection. In the opinion given by *Tilghman, C. J.*, it was said, "In England there are some acts of immorality, such as adultery, of which the ecclesiastical courts have taken cognizance from the very ancient times, and in such cases, although they tended to the corruption of public morals, the temporal courts have not assumed jurisdiction. This occasioned some uncertainty in the law; some difficulty in discriminating between the offenses punishable in the temporal and ecclesiastical courts. Although there was no ground for this distinction in a country like ours, where there was no ecclesiastical jurisdiction, yet the common law principle was supposed to be in force, and to get rid of it punishments

were inflicted by act of assembly. There is no act punishing the offense charged against the defendants, and therefore the case must be decided upon the principles of the common law. That actions of public indecency were always indictable, as tending to corrupt the public morals, I can have no doubt; because, even in the profligate reign of Charles II, Sir Charles Sedley was punished by imprisonment and a heavy fine for standing naked in a balcony in a public part of the City of London. It is true that, besides this shameful exhibition, it is mentioned in some of the reports that he threw down bottles containing offensive liquor among the people; but we have the highest authority for saying that the most criminal part of his conduct, and that which principally drew down upon him the vengeance of the law, was the exposure of his person. Neither is there any doubt that the publication of an indecent book is indictable. . . . What tended to corrupt society was held to be a breach of the peace and punishable by indictment. The courts are guardians of the public morals, and therefore have jurisdiction in such cases. *Hence it follows that an offense may be punishable if in its nature and by its example it tends to the corruption of morals although it be not committed in public.* (Italics mine, G.C.C.) . . . The defendants are charged with exhibiting and showing to sundry persons, for money, a lewd, scandalous and obscene painting. A picture tends to excite lust just as strongly as a writing; and the showing of a picture is as much a publication as the selling of a book."

Privacy is no excuse. "The law is not to be evaded by an artifice of that kind. If the privacy of the room was a protection, all the youth of the city might be corrupted by taking them one by one into a chamber, and there inflaming their passions by the exhibition of lascivious pictures. In the eye of the law this would be a publication and a most pernicious one. (Defendants condemned.)

Comment. Notice the date. There are numerous statutes today which cover all such cases. This, as a case settled upon the basis of the common law, is probably of great significance for the subsequent statutes.

It is not necessary to define indecency. There was much dissent from the standards of the late Anthony Comstock even by those whom he would have accounted decent people. Doubtless many things have been accounted indecent in the past which now are suffered or applauded. It does not follow that the things counted indecent in the past were so or that the things now applauded are decent; all that we can say is that what offends the general sense of the community will be punished *as indecent.*

Sunday Laws

STATE OF NEBRASKA *v.* TIM O'ROURKE ET AL.

35 NEB., 614, 1892

(Milburn's Curious Cases, p. 110.)

This case need not be set forth at length. The defendants were charged with violating Sec. 241 of the

Criminal Code — in that they played baseball on Sunday.

They entered a plea of not guilty and were found not guilty by the county judge without a jury. The judge of the Supreme Court (on appeal by the county attorney) said, "The sole question involved was one of fact as to whether or not they had violated the provisions of the statute and upon this finding of fact the decision of the court is final. I am at a loss to determine upon what question of law exception can be taken, the question being solely one of fact."

Further he went into a long and amusing diatribe, very learned in character, against the inconsistencies of the various states in their obsolete Sunday laws — but concluded by affirming the guilt of the defendants on the ground that the facts had not been impugned and the statute stood. It was the business of the court to decide in accordance with the facts and the law.

BOSWORTH *v.* INHABITANTS OF SWANSEY

10 Metcalf 363, 1845 — Smith 113

The plaintiff sued for damages received by him in traveling over a road which was in bad repair. The damages were unquestionable and the bad condition of the road was acknowledged. The defendants also acknowledged that it was their duty to keep the road in repair.

Their only defense was that the plaintiff was traveling on Sunday, on secular business, not from necessity or charity.

Shaw, C. J., held that to maintain this action, it must appear that the accident was occasioned exclusively by the defect of the highway; to establish which it must appear that the plaintiff himself is free from all imputation of negligence or fault. Now the statute of that date provided that "no person shall travel on the Lord's Day, except from necessity or charity." The plaintiff cannot prove necessity or charity.

Verdict for the defendants.

Comment. Properly speaking this is a case of observance of statute, not a Sunday law case. Many statutes are habitually broken without punishment, simply because no one brings any action which uncovers the statute. Such Sunday laws as the above have, for the most part, been repealed. There are many similar laws unrepealed. They do no harm as a rule; but, now and then, some one zealous for what they once represented, brings an action; and the result is almost always a conviction, though for a nominal fine or penalty. It is the plain duty of every court to convict those offending against any statute, however archaic or ridiculous. The only recourse of the court is the imposition of a nominal penalty. Citizens disobey any statute, no matter how trivial or ridiculous, at their own peril.

SUTTON *v.* TOWN OF WAUWATOSA

29 Wis. 21, 1871

In this case cattle were driven on to a bridge which was so rotten that many of them were precipitated into the water, some drowned, etc. Damages were claimed and the trial court refused damages on the ground that the cattle were being driven on a Sunday. Plaintiff appealed and *Dixon, C. J.*, in granting a new trial, made the following points: The plaintiff was undoubtedly doing an unlawful act; but it did not constitute contributory negligence. Cases cited may be summed up as follows: "There are two just and plain principles. First, that one party to the action, when called upon to answer for the consequences of his own wrongful act done to the other, cannot allege or reply the separate or distinct wrongful act of the other, done not to himself or to his injury, and not necessarily connected witl , or leading to, or causing or producing the wrongful act complained of; and, secondly, that the fault, want of due care or negligence on the part of the plaintiff, which will preclude a recovery for the injury complained of, as contributing to it, must be some act of the plaintiff having the relation to that injury of a cause to the effect produced by it.

. . . It is obvious that a violation of the Sunday law is not of itself an act, omission, or fault of this kind, with reference to a defect in the highway or in a bridge

over which a traveler may be passing, unlawful though it may be."

Comment. These are cited merely as examples of cases which may arise under the prohibition of work or amusement on that day. "Works of necessity or mercy" now include a great variety of things certainly not originally contemplated; and about all that is left of the old prohibitions consists of the forbidding of anything which disturbs public worship or unduly shocks a community. And that, very naturally, varies with the community. In Oregon, Nov. 6, 1915, a Sunday closing law which had been on the statutes many years was declared invalid on the ground that it specified that certain lines of business should not be conducted on the "Lord's Day." The court held this to be religious discrimination. This has its place in a Liberty classification too.

COMMONWEALTH *v.* MARSHALL

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1831

(Reported 11 Pick., 350. Beale, 18, 3d ed.)

Defendants were indicted for a misdemeanor in disinterring a dead body. This would have been an offense under the common law; but by a statute of 1814 the common law was superseded and, although the statute was subsequently repealed, the act charged upon the defendants as an offense was done after the passing of the statute of 1814 and before that of 1830. The act cannot be punished as an offense at common law; for that was not in force during the existence of

the statute; nor by the statute of 1814, because it has been repealed without any saving clause; nor by the statute of 1830, for the act was done before that statute was passed.

No judgment on this indictment.

Comment. Here is a clear case of failure of justice. The act done was an offense against decency but it went unpunished because of technicalities.

Selling Liquor

COMMONWEALTH *v.* CHURCHILL

MASSACHUSETTS, 1840

(Beale, 34, 2d ed.)

In the Court of Common Pleas the defendant was convicted for selling liquor without a license. He appealed to the Supreme Court on the unconstitutionality of certain statutes upon which the conviction was based and because the statutes themselves had been subsequently repealed. "It is conceded (says *Shaw, C. J.*,) "to be a maxim of the common law, applicable to the construction of statutes, that the simple repeal of a repealing law, not substituting other provisions in place of those repealed, revives the pre-existing law."

It was held that the common law existed in the state of Massachusetts before the Revolution — and its provisions relate partly to the rules of construction for the

expounding of statutes. The statute in question which had indeed been repealed, simply revived a previous statute, under which the defendants were equally guilty.

The exceptions taken by the defendants were overruled and the conviction stood.

Neglect of Education

REX *v.* WILLIAM SMITH

2 Carrington & Payne 449, 1826

George Smith, a man of about forty years of age, was an idiot, in the care of his brothers and a sister. An investigation showed that he was kept in a dark and filthy room without proper care of any sort.

He had been left an annuity of £50. The complaint alleged that it was the duty of his brothers and sister to care for him properly.

Burrough, J., said, "I am clearly of opinion, that, on the facts proved, there is no assault and no imprisonment in the eyes of the law. In the case of *Squires* and his wife for starving the apprentice, the husband was convicted, because it was his duty to maintain the apprentice, and the wife was acquitted, because there was no such obligation on her. I expected to have found in the will of the father, that the defendants were bound, if they took the father's property, to maintain this brother; but under the will they are only bound

to pay him £50 a year, and not bound to maintain him. William Smith appears to have been the owner of the house, and Thomas and Sarah were mere inmates of it, as their idiot brother might be; and how can I tell the jury that either of the defendants has such care of this unfortunate man as to make them criminally liable for omitting to attend to him. There is strong proof that there was some negligence; but my point is, that *omission without a duty will not create an indictable offense.* (Italics mine, G.C.C.) There is a deficiency of proof of the allegation of care, custody and control, which must be taken to be legal care, custody and control. Whether an indictment might be so framed as to suit this case, I do not know; but on this indictment I am clearly of opinion that the defendants must be acquitted. (Verdict — Not guilty.)

The indictment had been for assault, imprisonment and neglect.

Public Order and Peace

PEOPLE *v.* WALLACE AND LAKE

New York 85 App. Div., 70

The defendants, under notice from an organizer of the Socialist Labor Party, held a meeting in Amsterdam, N. Y., on Sept. 21, 1901, requesting the police to preserve order at the time. They neither sought for

nor obtained a permit; and when the Chief of Police found them haranguing a gathering crowd from dry goods boxes placed in the street near the curb, they denied the need of a permit. Lake said, "I told him the Socialist Labor Party was a regular political party which occupied the third column on the official ballot of New York State, and that the Constitution of the United States granted the right of free speech, and the public assemblage of people in any highway of the country and we didn't need a permit from any mayor to exercise that right."

The police several times tried to keep a passage way in the streets which had become blocked, though not completely. They told Lake he was obstructing the street and would have to stop speaking. He declined to do so, saying that, if the streets were not clear it was the duty of the police to keep them clear. The officers then attempted to clear the sidewalks and street without interfering with the speaker, and they were unable to do so. The crowd increased in number and the whole police force of the city was summoned but could not keep the crowd in order. The boxes were put on the sidewalk but the defendants took them back to the street. There was much disorder and many threats were heard. One man was struck by a stone.

Finally the police arrested the defendants and took them to the police station, after which the crowd was easily dispersed.

This account is condensed from the opinion of

Chase, J. In the trial court the defendants were convicted of a misdemeanor. The punishment given is not stated in the above authority.

The Appellate Court confirmed this conviction. *Chase, J.*, saying (opinion condensed but in his words), "The question of the constitutional right of citizens to peaceably assemble and discuss public questions is not before us for discussion, neither is it necessary to determine whether such constitutional right authorizes a person to hold a public meeting in a public street without the permission of the municipality. Streets and highways are for the use of all the public to pass and repass thereon, and it is the duty of the police authorities of a city to see that a reasonable passage way is preserved. That the public peace was seriously disturbed and endangered at the time of the defendants' arrest cannot be doubted by any one who examines the record herein. Whether such serious disturbance and danger was caused by the defendants was a question of fact presented to the jury after all the parties had had a full and fair opportunity to present their evidence in relation thereto. . . . It is reasonably certain that the persistence of the defendants in dragging their boxes, etc., and in haranguing the crowd . . . were at that particular time the immediate causes of the serious disturbance and danger to the public peace. As said by the Court of Appeals in *People* v. *Most*: 'A breach of the peace is an offense well known to the common law. It is a disturbance of public order by an act of violence, or by any act likely to produce violence,

or which by causing consternation and alarm disturbs the peace and quiet of the community.' "

Comment. There can be no doubt that this is the law. It is to be observed, however, that streets are frequently blocked by crowds which the police make no endeavor to disperse. This is on those occasions when the crowd is gathered for some reason in the manifest interest of the whole people as, e.g., on patriotic occasions like the return of troops from war. There are few gatherings of a riotous character except those incited by the opposition. This is not said in criticism or with any wish to express a partisan attitude but simply to call attention to a fact. There is no need to gather a crowd to support what every one, or the majority, is already supporting.

Offense against the Common Weal

REGINA *v.* STEPHENS

QUEEN'S BENCH, 1866

(Reported L. R. 1 Q. B., 702. Beale, 252, 3d ed.)

The defendant was owner of a slate quarry on the river near the castle of Kilgerran, which he had extensively worked since 1842. Rubbish from the quarries had been stacked five or six yards from the river and held back by a wall; but in 1847 a flood swept away this wall and rubbish. Quantities of additional rubbish were from time to time deposited on the bank and allowed by workmen to slide down into the river and obstruct navigation. It was offered in evidence that

workmen had been instructed not to deposit rubbish at this place but the judge intimated that this evidence was immaterial; and he directed the jury that as the defendant was the proprietor of the quarry, it was his duty to take all proper precautions, etc., and that if a nuisance was caused by his workmen, even without his knowledge and against his orders, it was his act. The jury found a verdict of guilty — obstructing navigation of a public river.

On motion for a new trial, *Mellor, J.*, sustained the decision saying, "It is quite true that this in point of form is a proceeding of a criminal nature, but in substance I think it is in the nature of a civil proceeding. . . . Here it is perfectly clear that the only reason for proceeding criminally is that the nuisance, instead of being merely a nuisance affecting an individual, or one or two individuals, affects the public at large and no private individual, without receiving some special injury, could have maintained an action. . . . If the contention of those who say the direction is wrong is to prevail, the public would have great difficulty in getting redress."

Blackburn, J., wished to guard himself "against it being supposed that the general rule that a principal is not criminally liable for the act of the agent is infringed. All that is necessary to say is this, that where a person maintains works by his capital, and employs servants, and so carries on the work as in fact to cause a nuisance to a private right, for which an action would lie, if the same nuisance inflicts an in-

jury upon a public right, the remedy for which would be by indictment, the evidence which would maintain the action would also support the indictment. That is all that it was necessary to decide and all that is decided."

Comment. *Qui facit per alium facit per se.* A manufacturer or employer of labor is responsible for the acts of his workmen, and is open to a claim for damages; but further, and importantly, it is decided that the public's rights cannot be set lower than those of any individual. And as an individual can bring action for a nuisance, so can the public. The opinion of Justice Blackburn is very pertinent. Our interest is not in the form of procedure, which he defends, but in the security of the public which the decision defends.

THE NATURAL LAW OF OFFENSES AGAINST SECURITY

The nature of these offenses implies that there have been established certain very definite values — such as life, integrity of the person, property, reputation and the like. The offenses here considered are not direct attacks upon life or upon property but rather upon that secure possession of them which constitutes one of man's most prized privileges. It has its culmination and most concrete expression in the idea of Public Order or Decency.

These offenses too are classed, not according to the degree of reprobation manifested toward them by society, but according to their nature, those cases be-

ing grouped together which have some sort of affinity. In consequence there is no gradation from that which is most reprobated down (or up) to those either condoned or positively praised; except that it is obvious that the most serious offense is treason and that anything which would betray an open enemy of the group would be considered highly meritorious.

Some of the offenses are very complex and it is almost impossible to analyze them. For example, kidnapping, adultery and seduction may also be assaults although they need not be. All the offenses under the caption Reputation are capable of becoming property cases. Inciting to murder is pretty close to plain murder.

There is no clear law outstanding from the multitudes of cases under "security" except one which I formulated tentatively some years ago.[1]

The group punishes severely anything which threatens group continuance. Treason is never forgiven if known to exist. If the group is to survive, treason in any form, when known, must be visited with death, at least during times of stress.

Lack of attention and old custom alone are responsible for society's neglect of things more directly subversive of its principle than some which are severely reprobated.

This seems more like an impressionistic sketch than a law. Let us not think of it as the law but rather

[1] Case Method in the Study and Teaching of Ethics *op. cit.*, p. 345.

as prolegomena to a law which should then be formulated as follows:

Individual action is always subordinated to group stability; and anything which threatens the security of the group in the opinion of the authorities of the group will be treated as a crime.

But individualistic action seems to be approved by the group in many ways. The English and American traditions are based upon Magna Charta and various Bills of Rights which speak much of the rights and liberties of individuals. This is indeed the principle upon which our security is based, to give as much scope to the individual as possible; but it is always limited by the group needs.

Observe particularly that the principle *caveat emptor*, — let the buyer beware, — is highly individualistic — but note also that this principle no longer holds sway except where it has been overlooked. We have Pure Food Laws and the like, standards of weights and measures, Blue Sky Laws, Workmen's Compensation Acts and a multitude of other similar things to indicate that the individual is protected *in the interest of society* against other individuals instead of being left, as on the *laissez-faire* theory of government, to fight it out with them as best he may.

So the Standard Oil Case and all others under the Sherman Law apparently indicate a tenderness for the individual. But this is not really true. Enhanced prices were thought to be due to restriction of compe-

tition, hence competition must be left unrestricted *in the interest of the group*. Moreover the English decision in the Mogul Steamship Company Case (*q.v.*) is distinctly restrictive of competition *in the interest of the group*. It must be noted too that restraint of trade was not an offense at common law; it was made so by statute and only for the reason given above. Modern opinion that Big Business is not necessarily Bad Business shows the swing of the pendulum and makes plain that the individual *per se* is not being considered.

The law of the past has tended to treat individuals as separate sovereigns with whom one might interfere at his peril. Whatever they did to one another was indifferent to society. The Common Law attitude towards adultery and fornication (except the adultery of the wife, seduction, etc., which offend a property right) is an example of this. Except where, under the influence of the Canon Law (Law of the Church), some religious motive enters in, society is indifferent to what men do to one another so long as it does not influence the group. The adoption of the Canon Law rule concerning adultery rather than the Common Law is due partly, at least, — in my opinion at any rate — to a feeling that the public order and decency have been disturbed. Modern liberality in the treatment of blasphemy cases is an apparent contradiction of this rule since it seems to leave room for individualism, but it is more likely that the public realizes that there is no danger to its peace and safety in such utterances

and so individuals may be left free in things indifferent.

Various courts have decided, especially in labor cases, that every man has a right to conduct his business to suit himself — yet labor unions have been repeatedly upheld and picketing has been held to be legal. The opinions of Justice Holmes, especially, show the refusal to be bound by an Eighteenth Century conception of society with its extreme individualism. This is interesting in itself but important here simply as the coming to consciousness of a permanent and universal characteristic of legislation and judicial decision; for, in spite of all appearances to the contrary, it has always been the tendency of social groups.

The deliberate and conscious practice of the Federal Government, according to the Constitution, in its dealings with the states of the Union will well exemplify the attitude of society towards its constituent members. They may act towards one another as sovereign states except where the interests of the Federal Government are threatened. In that case they will be rigorously suppressed. This will be much more evident in our summing up in cases under the classification *Liberty* and further consideration of it is postponed.

I do not think the formulation of more detailed laws at this point is either profitable or desirable. Indeed this law is purely tentative and meant to serve as a guide only.

It may be added that it is probably the instinct for security which demands such strict attention to mak-

ing *some one* responsible in damages, if not criminally, even though it be a child, an idiot or an insane person — and insists upon the principle of agency, *qui facit per alium facit per se.* Even righteousness of intention cannot abolish this responsibility.

PART IV

PRESERVATION OF LIBERTY

LIBERTY CASES

Offenses against liberty and legal or approved interferences with or restrictions of liberty

- **I. *Interference with Bodily Freedom***
  - Legal in past times and still in some places — illegal in most of Christendom
    - Slavery
    - Serfdom
    - Peonage
- **II. *Interference with Freedom of Movement***
  - (*a*) Illegal
    - White Slavery
    - Kidnapping (Press Gang)
    - False Imprisonment — *Habeas Corpus*
  - (*b*) Legal
    - Immigration Laws
    - Emigration Laws
    - Requirement of Passports
    - Restricted districts
    - Jim Crow Cars
    - Ghettoes
    - Restriction of Right of Assembly
- **III. *Interference with Freedom of Action***
  - (*a*) Carrying Weapons
    - (1) Openly
    - (2) Concealed
  - (*b*) Police Regulations
    - (1) Ordinary regulations regarding traffic, building operations, streets, lights, signs, licenses, etc.
    - (2) Police power of state applied to:
      - Labor Unions
      - Manufacturers' Associations
      - Trust Regulations
      - R. R. rates, etc.
      - Hours of Labor
      - Employers' Liability
      - Workmen's Compensation
      - Strikes and Picketing
      - Blacklisting
    - (3) Offenses against security
  - (*c*) Freedom in Property Rights
    - Taxation, including tariffs and licenses
    - Franchises
    - Eminent domain
    - Rights of way
    - Public Hotels, Inns, etc.
    - Common Carriers
    - Contract
    - Rights to means of livelihood (tools of trade, homestead, etc.)
    - Trade
- **IV. *Interference with Freedom in Personality***
  - Legal
    - Marriage and divorce laws
    - Worship
    - Being put in fear
    - Speech — libel — contempt of court
    - Political action
    - Suffrage — 14th amendment — Grandfather clause
    - Association
    - Lèse Majesté
    - Injunctions
    - Sumptuary Laws
    - Propaganda cf. Worship and Speech
    - Prohibition

PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES WITH RESPECT TO LIBERTY

Article I — Section 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

. . . To regulate commerce. . . . To establish a uniform rule of naturalization . . . Section 9. The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

Article III — Section 2. . . . The trial of all crimes, except in cases of impeachment, shall be by jury;

Article IV — Section 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in con-

sequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Amendments

Article I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Goverment for a redress of grievances.

Article II. A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Article III. No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Article IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the

militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

Article VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Article VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Article X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article XIII — Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Article XIV — Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws.

Article XV — Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State, on account of race, color or previous condition of servitude. . . .

Article XVI. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

Article XVIII — Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the im-

portation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Definition of Liberty

ALLGEYER *v.* LOUISIANA

165 U. S. 578 (1897)

Mr. Justice White said "Liberty means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in lawful ways; to live and work where he will; to earn his livelihood by any honest calling; to pursue any livelihood by any honest calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned. In the privilege of pursuing an ordinary calling or trade and acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto." (Condensed by Justice Swayze from the opinion.) Later decisions have limited this broad definition.

Mr. Justice Hughes said (*C. B. & Q. R. R. Co.* v. *McGuire,* 219 U. S. 549 *et passim*): "There is no

absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.

The right to make contracts is subject to the exercise of the powers granted to Congress for the suitable conduct of matters of national concern, as for example the regulation of commerce with foreign nations and among the several states.

It is subject also, in the field of state action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals and welfare of those subject to its jurisdiction."

Public Expressions Regarding Liberty from various sources

"Taxed or deprived of their property for public uses." *Virg. Decl. Rights VI.*

"No man to be deprived of liberty except by the law of the land or the judgment of his peers." *Do. VIII.*

"The law ought to prohibit only actions hurtful to society. What is not prohibited by the law, should

not be hindered; nor should any one be compelled to that which the law does not require."

Declaration of the Rights of Man, V. French, 1789.

"The unrestrained communication of thoughts and opinions being one of the most precious rights of man, every citizen may speak, write, and publish freely, provided he is responsible for the abuse of this liberty, in cases determined by the law."

Do. XI, par. 7. *Cf. also French Const., June* 24, 1793.

"The right to property being inviolable and sacred no one ought to be deprived of it, except in cases of evident public necessity, legally ascertained, and on condition of a previous indemnity."

Cf. also Const. June, 1793, *par.* 17 *and* 19.

2 "Ces droits sont l'égalité, la liberté, la sûreté, la propriété.

Prefix to Const. of June 24, 1793 — *France.*

14 "Nul ne doit être jugé ou puni qu'après avoir été entendu ou légalement appelé, et qu'en vertu d'une loi promulgée antérieurement au délit. La loi qui punirait des délits commis avant qu'elle existât, serait une tyrannie; l'effet rétroactif donné à la loi serait un crime." *Do.*

31 "Les délits des mandataires du peuple et de ses agens ne doivent être jamais impunis. Nul n'a le droit de se prétendre plus inviolable que les autres citoyens."

Do. Cf. also Devoirs, in Declaration, 1795.

1. Celui qui viole ouvertment les lois, se déclare en état de guerre avec la société.

7. Celui qui, sans enfreindre les lois, les élude par ruse ou par addresse, blesse les interêts de tous; il se rend indigne de leur bienveillance et de leur estime.

8. C'est sur le maintien des propriétés que repose la culture des terres, toutes les productions, tout moyen de travail et tout l'ordre social.

9. Tout citoyen doit ses services à la patrie et au maintien de la liberté, de l'égalité et de la propriété, tout les fois que la loi l'appelle à les défendre.

All the above from the Appendix to Ritchie's "Natural Rights."

I. INTERFERENCE WITH BODILY FREEDOM

Slavery

Mr. Henry W. Nevinson in his book *Modern Slavery,* speaking of slavery in the Portuguese province of Angola in West Central Africa, shows that while men are bought and sold as slaves, it is done in the form of contract. He uses these words :

"Legally the system is quite simple and looks innocent enough. Legally it is laid down that a native and a would-be employer come before a magistrate or other representative of the Curator General of Angola and

enter into a free and voluntary contract for so much work in return for so much pay. By the wording of the contract the native declares 'that he has come of his own free will to contract for his services and according to the forms required by the law of April 29, 1875, the general regulation of November 21, 1878, and the special clauses relating to this province.'"

He signs and the benevolent law is satisfied. And then, Mr. Nevinson adds:

"If he runs away he will be beaten, and if he could escape to his home . . . he would probably be killed, and almost certainly be sold again(!). In what sense does such a man enter into a free contract for his labor? In what sense, except according to law, does his position differ from a slave? And the law does not count; it is only life that counts. . . .

"The difference between the 'contract labor' of Angola, and the old-fashioned slavery of our grandfathers' time is only a difference of legal terms. In life there is no difference at all. The men and women whom I have described as I saw them have all been bought from their enemies, their chiefs, or their parents; they have either been bought themselves or were the children of people who had been bought. The legal contract, if it had been made at all, had not been observed, either in its terms or its renewal. The so-called pay by the plantation tokens, is not pay at all, but a form of the 'truck' system at its very worst."

Professor Paul S. Reinsch confirms this in the following statement:

"Today the slave trade is carried on covertly under the name of contract labor, even by Europeans in their own colonies, especially in the Congo Free State, and in the Portuguese possessions." (Quoted from Ely. Property and Contract in their Relation to the Distribution of Wealth, pp. 582–3.)

Comment. By this system, slavery is plainly practiced under the forms of law. While no such system exists in the United States, there are similar violations of liberty of the person in peonage (*q.v.*) and in the "truck" system.

Peonage

"The dependence of contract reaches its worst phase in the so-called 'white slavery' which, we are told, also seeks the use of contractual forms. Next above this we find ordinary slavery of the old type. . . . Armenia in 1898 is described in a circular issued by missionaries. One missionary says, 'I heard of a father in Zeitoun who was determined to sell his children — Circassians are always ready to buy children — to prevent the whole family perishing.'"

"Peonage contracts in our South and some of the contracts for Italians made by them with their padrones. . . . From the reports of the United States Immigration Commission we learn that those laboring in shoe-shining establishments in this country are often peons, 'but as the elements of indebtedness and physical compulsion to work out the indebtedness are miss-

ing, peonage laws cannot apply.' The Greek shoe-shining industry contains probably the most extensive and the most serious system of peonage now in existence in this country.

"Conditions of peonage, second in seriousness, exist in the lumber camps of Maine where laborers are compelled to remain at work in the lumber camps through the instrumentality of a law passed in 1907. This law makes it a crime for one to enter into an agreement to work for a lumber company, receive an advance of money or of transportation and 'unreasonably and with intent to defraud' fail to work out his indebtedness. . . . In 1901, cases of contracts involving the service of negroes came before Judge W. C. Bennett of Columbia, South Carolina; the form of the contract including the following:

"'I agree at all times to be subject to the orders and commands of said . . . or his agents, perform all work required of me . . . or his agents shall have the right to use such force as he or his agents may deem necessary to compel me to remain on his farm and to perform good and satisfactory services. He shall have the right to lock me up for safekeeping, work me under the rules and regulations of his farm, and if I should leave his farm or run away he shall have the right to offer and pay a reward of not exceeding $25.00 for my capture and return, together with the expenses of same, which amount so advanced, together with any other indebtedness, I may owe . . . at the expiration of above time, I agree to work out under all rules and

regulations of this contract at same wages as above, commencing . . . and ending. . . .

" 'The said . . . shall have the right to transfer his interest in this contract to any other party, and I agree to continue work for said assignee same as the original party of the first part.' "

Much has been written about peonage in the South in recent years, and aggravated cases have even come before the courts. In its worst form, it means that negroes are sentenced to pay fines for trivial or even nominal offenses, and then, unable to pay these fines, they are sentenced to work them out for long periods for private employers. It appears that they are often kept in debt by private employers, and then are forced to continue in a condition of servitude to pay for the debts. These peons are kept under guards and in some cases they have been shot for attempting to escape.

(Note — Ely gives, *op. cit.*, p. 717–8, a copy of an actual *Alabama "Peonage" Contract* with fictitious names substituted for the originals; and in the rest of this highly important and most interesting chapter there is given an account of theatrical and baseball contracts which show conditions very similar to peonage. The notes to Ely's Chapter X are full and illuminating.)

Police Control of the Slave in South Carolina, p. 171, Henry, H. M., quotes a law of 1820 forbidding immigration of free persons of color. There had been restrictions on manumission also because of danger from freed negroes.

" In 1840 there came up to the Court of Appeals the

noted Carmille case.[1] A slave owner, Carmille, had died leaving a will which with reference to his slaves provided that they be set free if possible. If they could not be legally emancipated they were to be conveyed in trust to certain trustees who would allow them to hire their time, paying only a nominal sum to the trustees. This was unquestionably in conflict with the policy of the statutes on the subject of emancipation. Persons interested in the estate brought suit on the ground that the earnings of a slave belonged to his owner, in this case the heirs. The court held that the will of the testator was not contrary to the principles of the act of 1820 and was not in violation of the state's policy towards the negro, and that the will ought to be carried out."

This "roused the sentiment of the legislature and caused the passage of the sweeping act of 1841. This act shows that there were reasons other than the mere policy of preventing an increase in the number of free negroes in the state. It made void all bequests, deeds or trusts of slaves made with the stipulation that they be removed from the state and set free; and provided that the donee might be held responsible to the heirs and next of kin for an accounting of the value of slaves so transferred by the donor; it nullified all bequests or trusts of slaves with a view of holding them in nominal slavery, but allowing them to act as free

[1] 2 McMullan, 454 — *Carmille* v. *Administrators of Carmille et al.* Statutes at Large, xi, 168, cf. *Morton* v. *Thompson,* 6 Richardson, 374 (1854).

persons; it also prohibited any devise or bequest of property from being held in trust for the benefit of slaves. The statute depended for its due enforcement upon the provision that any person attempting to administer a will and carry out such provisions could be held financially responsible by heirs or other beneficiaries."

Mr. Henry shows that this extreme statute was never seriously enforced.

As a consequence of negro plots in 1820 and thereabouts statutes were passed requiring every free negro over 15 years of age to have a guardian who would vouch for him. He could not carry arms except with the written permission of his guardian.

"The legal status of the free person of color. . . . He was tried for crime before the same kind of court as that provided for the trial of slaves; he was subject to the same kind of penalties — corporal punishment — with the possible addition of a fine; his testimony could not be accepted in court against a white person, though a slave was a competent witness against a free negro; he had a full right to acquire, hold and transfer property; he might and often did own slaves."

See also pp. 181–2 of this same work for a judicial opinion regarding the status of the free negro which contained the statement of a judge of the Court of Appeals: "I have always thought and while on the circuit ruled that words of impertinence and insolence, addressed by a free negro to a white man, would justify assault and battery."

Comment. Here we have, alongside of actual cases of slavery of a kind now no longer existing, a repression of those who, under the law, had been freed from slavery, which practically amounted to slavery itself. This was done in the interest of the police power of the state though the term had not then been coined; and the liberty of those who nominally were as free as the most free, was thereby abridged by the law, as it is in fact though not in form today.

II. INTERFERENCE WITH FREEDOM OF MOVEMENT (a)

False Imprisonment

WONG WING *v.* UNITED STATES

163 U. S. 228

By the act of September 13, 1888 (Sec. 13, C. 1015, 25 Stat. 476, 479) it was provided as follows: "That any Chinese person, or person of Chinese descent, found unlawfully in the United States or its Territories, may be arrested upon a warrant issued upon a complaint under oath, filed by any party on behalf of the United States, by any justice, judge or commissioner of any United States Court, returnable before any justice, judge or commissioner of a United States Court, or before any United States Court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States,

such person shall be removed from the United States to the country whence he came."

A section of an act passed Oct. 1, 1888, declared "That from and after the passage of this act it shall be unlawful for any Chinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart therefrom, and shall not have returned before the passage of this act, to return to, or remain in the United States."

The validity of these acts was assailed because they were alleged to be in conflict with existing treaties between the United States and China, and because to deport a Chinaman who had, under previous laws, a right to return to the United States, was a punishment which could not be inflicted except by judicial sentence.

But these contentions were overruled and the validity of the legislation sustained by this court in the case of *Chae Chan Ping* v. *United States,* 130 U. S. 581. In this case it was held, in an elaborate decision by *Mr. Justice Field,* that the act excluding Chinese laborers from the United States was a constitutional exercise of legislative power; that, so far as it conflicted with existing treaties between the United States and China, it operated to that extent to abrogate them as part of the municipal law of the United States; and that a right conferred upon a Chinese laborer, by a certificate issued in pursuance of previous laws, to return to the United States, could be taken away by a subsequent act of Congress.

Another act of May 5, 1892, still further strengthened these positions requiring those who were entitled to remain to obtain certificates and ordering the deportation of all found without them.

It was held in the case of *Fong Yue Ting* v. *United States,* 149 U. S. 698, that the right to exclude or to expel aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation; that the power of Congress to expel, like the power to exclude, aliens or any class of aliens from the country, may be exercised entirely through executive officers.

In the act of 1892 provision was made for the imprisonment at hard labor of any Chinese unlawfully remaining in the country. This, it was maintained, inflicts an "infamous punishment" and conflicts with the Fifth and Sixth Amendments to the Constitution which declare that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment, etc., by a grand jury.

The government claimed that not all cases of punishment at hard labor were "infamous punishments" — many statutes held constitutional provide for the punishment by imprisonment at hard labor of vagrants. *Mr. Justice Shiras* in his opinion held that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Detention is a usual feature of every case of arrest on a

criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense. It was held by *Mr. Justice Gray* (in *Fong Yue Ting* v. *United States*) that the proceedings to ascertain whether an alien may remain in this country are in no proper sense a trial for a crime or offense, and *Justice Shiras* in the case here reported holds that Congress may not submit aliens as such to infamous punishment at hard labor or by confiscating their property unless provision is made for a judicial trial to establish the guilt of the accused. This had not been done in the case in question. Wong Wing and others had simply been imprisoned by executive officers and set to work. The judgment of the lower court was therefore reversed.

Comment. Although this is given as a case of false imprisonment, it throws considerable light also upon the practice, not only of the United States but of all countries, with reference to the liberties accorded to aliens. These liberties are strictly limited by treaties in any case and can never hold against the manifest interest of the country in question. As a false imprisonment case it is plain and needs but a word of comment. In so far as Wong Wing was under the protection of the United States at all, as a resident alien, he was permitted the same treatment as a citizen and false imprisonment could not be tolerated.

FOTHERINGHAM *v.* ADAMS EXPRESS COMPANY

UNITED STATES DISTRICT COURT — EASTERN DIST. MISSOURI, 1888

(Reported in 36 Federal Reporter, 250.)

Thayer, J. With reference to the motion for a new trial which has been filed in this case and duly considered, it will suffice to say, that I entertain no doubt that the jury were warranted in finding that plaintiff was unlawfully restrained of his liberty from about the 27th or 28th of October until the 10th of November following; that is to say, for a period of about two weeks. The testimony in the case clearly showed that during that period he was constantly guarded by detectives employed by defendant for that purpose; that he was at no time free to come and go as he pleased; that his movements were at all times subject to the control and direction of those who had him in charge; that he was urged by them on several occasions to confess his guilt, and make known his confederates; and that he was subjected to repeated examinations and cross-examinations touching the robbery, of such character as clearly to imply that he was regarded as a criminal, and that force would be used to detain him if he attempted to assert his liberty. The jury in all probability found, as they were warranted in doing, that

during the time plaintiff remained in company with the detectives, he was in fact deprived of all real freedom of action, and that whatever consent he gave to such restraint was an enforced consent, and did not justify the detention without warrant."

The Judge further discussed the question of the damages assessed upon the Express Company. These were greater than would have been due from mere false imprisonment which was conceded to have been without malice. The damages were plainly punitive damages, and these do not depend wholly upon the existence of malice. "Punitive damages may be awarded when a wrongful act is done wilfully, in a wanton or oppressive manner, or even when it is done recklessly, — that is to say, in open disregard of one's civil obligations and the right of others." The nature of the right invaded must be considered and the effect upon social order of permitting a wrong-doer to escape without substantial punishment. There was no doubt that the jury could assess substantial damages upon the wrong-doer in this case. "The plaintiff was taken into custody, originally, without a warrant, and was detained without even the color of legal process for such an unreasonable period that the wrong cannot be excused, under our system of government, by the plea that such arbitrary measures were necessary to discover the perpetrators of a great crime."

It was plain too that the captors had exceeded discretion in their treatment of the prisoner. But Judge Thayer found the damages excessive even in view of

the great wealth of the defendant. However, in view of the great expense of a new trial, he permitted the plaintiff to remit 40 per cent of the damages, $8000 (the verdict thus having been for $20,000) within five days — otherwise he would order a new trial.

Comment. The points to be noted here are that there was no warrant and hence there was no due process of law and that, although malice was wanting, the plaintiff had *as a matter of fact* been unjustly deprived of his liberty. Intent here may be presumed to have been good — but the act was bad none the less.

MOYER *v.* PEABODY

U. S. Supreme Court, 1909

(212 U. S. 78.)

The plaintiff alleged that he had been imprisoned from March 30th, 1904, to June 15th. The imprisonment, he said, was without probable cause, that no complaint was alleged against him and that he was prevented from having access to the courts of the state.

The defense was that there was insurrection in Colorado, and the defendant, Governor Peabody, had called out the militia as was his right, and duty. He ordered the arrest of the plaintiff as a leader of the outbreak.

As to the facts, the decision holds that the Governor is final judge of there being a state of insurrection, and that he cannot be subjected to an action after he

is out of office on the ground that he had not reasonable ground for his belief. Public danger warrants the substitution of executive for judicial process; and the ordinary rights of individuals must yield to what the executive honestly deems the necessities of a critical moment. Therefore he cannot be held for false imprisonment. (Judge Swayze has commented on this case: "The court might have added, *Silent leges inter arma.*")

Comment. Judge Swayze's remark is most pertinent. Necessity knows no law and it is necessary to the safety of the state that its executives, in time of stress, should not be made liable for possible mistakes or malice. The only redress is through public opinion. There is unquestioned suppression of liberty here but it is not a case of false imprisonment because there was practically a condition of martial law and imprisonmnt was not subject to the usual restrictions. This makes an excellent security case if we consider the attitude of the state toward its chosen officers.

Habeas Corpus

STATE *v.* ENDSLEY

TENNESSEE, 1908 (?)

(135 American State Reports)

In March, 1908, one Endsley was tried in the Circuit Court of Marshall County for selling intoxicating liquors without a license. He was convicted and sen-

tenced to six months in the county jail and to pay fifty dollars fine. The imprisonment began on March 24, 1908. On May 14, 1908, the sheriff, by an arrangement made with the county court and one Wheeler, released the prisoner to Wheeler who paid his fine and costs, the prisoner consenting to remain with Wheeler and work to repay the amount of the fine, etc. Subsequently the sheriff concluded that he had acted wrongfully and unlawfully in releasing the prisoner before the expiration of his sentence, so he re-arrested him and put him in jail there to remain until his sentence should expire. This arrest was made without a warrant.

Upon this there was a petition sued for release on *habeas corpus*.

The court declined to release him though blaming the sheriff for the re-arrest without a warrant. A prisoner wrongfully released has no claim to be discharged because of a re-arrest.

Comment. Whatever the action of the sheriff, the liberty of the prisoner was not infringed — for he had been deprived of it by due process of law and nothing in his own act or that of a proper court had changed his status.

Passports and Registration of Strangers

The Chinese exclusion act of 1892 requires of Chinese laborers certificates of residence without which their being in the country is deemed unlawful.

"It was said in the Passenger Cases (7 How. 283,

404) that every state has an unquestioned right to require the register of the names of the persons who come within it to reside temporarily or permanently." Freund, pp. 40–41.

Permits de séjour are required in France and in Switzerland; similar permissions are even more closely supervised in Germany and Russia. The countries of Europe vary greatly in the strictness of their requirements, England being probably the most lax and Germany and Russia the most severe; but there is no question raised regarding the right of the government to make these requirements.

Freedom of Movement

Virginia Code, Sec. 1294-d, provides that there shall be separate quarters for white and colored persons on steam and electric roads. There shall be no discrimination in quality of accommodations and they must be equally well heated in cold weather; but the amount of space reserved for either race is not specified and is within the discretion of the company. It is further provided that passengers must obey the orders of the conductors of cars, who are special policemen, on penalty of being ejected from the cars without redress even though they should have paid their fares.

These provisions do not apply to employees or to nurses or to officers in charge of prisoners or lunatics.

The coaches on trains are to be marked plainly with signs indicating whether they are for white persons or for colored.

The same provision is made for separating the races on steamships and in waiting rooms.

Comment. This is kept from being, or appearing to be, class legislation by making it apply equally to both races. It is as much of an offense for a white person to intrude into colored quarters as for the colored people to intrude into white quarters.

Right of Assembly

COMMONWEALTH *v.* GIBNEY

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1861

(Reported 2 Allen, 150. Beale, 65, 3d ed.)

Defendants were indicted, five in number, with divers other persons because on December 31st, 1860, they assembled "with force and arms, to wit, with clubs, staves, stones and other dangerous and offensive weapons" at Union Hall, the property of one Foy, at night, and there made a great disturbance, breaking windows and making much noise for about an hour.

They were adjudged guily in the Superior Court but the case was taken up to the Supreme Court and the decision was reversed.

Dewey, J., gave the various authorities on riots and unlawful assemblies:

"To maintain an indictment for riot, the prosecutor must prove 1. The assembling, 2. The intent namely 'that they so assembled together with intent to execute

some enterprise of a private nature and also mutually to assist one another against any person who should oppose them in doing so, — a riot requires three or more persons assembling together." In Deacon's Crim. Law a riot is said to be " a tumultuous meeting of three or more persons who actually do an unlawful act of violence, either with or without common cause or quarrel," " or even do a lawful act, as removing a nuisance in a violent and tumultuous manner." There must be unlawful assembly for a riot though the assembly may have been lawful at first and afterwards become unlawful by its acts.

Comment. In the present case, there were no proper allegations regarding the assembly of three or more persons. In other words, this plain and unmistakable riot was not punished because the form of indictment was wrong. This is an excellent example, perhaps, of the security which the general public enjoys from the forms of the law. It is contended by many that it is far better to have an occasional miscarriage of justice, failure to convict obvious offenders, than to have innocent people injured by breaking down that defense which comes from the necessity of using the proper form of indictment and the right plea.

Mere assembling is not counter to the law — but it is obvious that any assembling is likely to be counted riotous if done by the malcontents of any community, whatever their purpose, base or noble.

III. INTERFERENCE WITH FREEDOM OF ACTION. — POLICE REGULATIONS.

Freedom of Action

New York Times, July 19, 1916.

The Court of Appeals has decided that a large sign, erected by the O. J. Gude Company on top of a building at 47th Street and Seventh Avenue, New York City, must be taken down or reduced in size. The ruling upholds the city building ordinance restricting the height of advertising signs to 75 feet above the roofs on which they are built even though the permits were issued before the new ordinance was passed in 1914.

Violation of Traffic Regulations

New York Times, July, 1916.

A new order in the enforcement of traffic regulations is indicated in the first official report of New York's Traffic Court. Before the court was established one-fifth of the fines for traffic violations were suspended, it is estimated, but none have been since the new court took over the hearing of all cases in Manhattan. No excuses have been accepted, the letter of the law being enforced in every case where violation was proved.

The report covers thirteen court days. The number of arraignments was 827. The total of fines paid into the court was $8,740, and $2,563 was paid to the De-

partment of Correction after commitment, making a total of $11,303.

Speed violations hold a strong first in the list, there being 300 of these, 278 first offenders, 19 second and 3 third. In violations of the corporation ordinances, overtaking a street car and passing within eight feet of it while it is receiving or discharging passengers, was second, with forty-eight convictions. Reckless driving came third, with thirty-three cases. In violations of the State highway law, the largest number was for having an improper number plate — sixty-five. Twenty chauffeurs were convicted of operating cars without licenses; three persons for driving cars while intoxicated, and six for failing to stop after an accident — a felony. There were twenty-three violations of the sanitary code by smoking motor vehicles.

One hundred and twenty-nine persons were committed in default of payment of fines, and sixty of these are serving sentences for non-payment. Two chauffeurs' licenses were revoked, and one owner's registration number was suspended. This was done under the city ordinance which provides that when it is established that the owner had ordered the chauffeur to speed the car, such action may be taken. Of the $8,740 fines paid to the Clerk of the Court all were for violations of the corporation ordinances except $607 credited to highway law and $93 to the sanitary code.

Rowland J. Sheridan, Clerk of the Court, said that horse-drawn vehicle violations had not been segregated from motor vehicle violations, and estimated that the

ratio of the former to the latter was 10 per cent. Magistrate Frederick B. House, who presides over the court, said regarding his experience in the court thus far:

"Conditions are somewhat better in the streets so far as reports come in from the police; that is, as to reckless driving and the eight-foot regulation as to street cars, but there does not seem to be any let-up in speeding. I think we shall have much trouble with this situation until there is a law requiring the licensing of owners, just as chauffeurs are licensed now, after an examination as to qualifications, with the same power to revoke the owner's license for cause. I think also the local authorities should have the power to impound a car involved in a violation, from one to thirty days, as is done in some of the European cities."

All fines for violations of the corporation ordinance are paid to the city, and the city keeps them; fines for all violations of the State highway law go to the State Treasurer, the city receiving a part of these back.

Comment. This newspaper article is quoted to show the variety and drastic nature of licenses and penalties under ordinary municipal police regulations. The interference with individual freedom is always in the interest of the group.

Police Power — Licenses

MUNN *v.* ILLINOIS

SUPREME COURT OF THE UNITED STATES, 1876

(94 U. S. 113.)

An article of the Constitution of the State of Illinois related to the establishment and regulation of public warehouses for grain, making *all* warehouses where grain or other property was stored for compensation public; and providing equal access of all comers, full publicity, etc., etc.

Munn & Scott of Chicago were charged, on June 29, 1872, with having failed to take out a license as public warehousemen and with having failed to give bond as required, although they were conducting such a business. Moreover they charged rates which were in violation of an Act of April 25, 1871. They were found guilty and fined $100. The judgment of the Criminal Court of Cook County was affirmed by the Supreme Court of the State; and thence the case was carried to the Supreme Court of the United States by the defendants who alleged unconstitutionality of the act and State Constitution.

Chief Justice Waite delivered the opinion which covered the following points:

Under the powers inherent in any sovereignty, a government may regulate the conduct of its citizens

toward each other, and, when necessary for the public good, the manner in which each shall use his own property. In the exercise of these powers it has been customary from time immemorial to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, etc.— and to regulate charges.

This is not to deprive an owner of his property without due process of law. Statutes regulating property and its use may so deprive, but they do not necessarily. The Fourteenth Amendment does not change the law in this particular; it simply prevents the states from doing that which will operate as such deprivation.

When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, so long as he maintains the use. He may withdraw his grant by discontinuing the use.

The law respecting rights of property and reasonable compensation for its use, may be changed by the legislature. The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.

There is no violation of the Constitution in the act in question.

The judgment of the lower court was affirmed.

There may be added the opinion of *Lord Hale,* as follows:

"A man, for his own private advantage, may, in a

port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz; makes the most of his own. . . . If the King or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the Queen, . . . or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the King's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building, on his own land, it is now no longer bare private interest, but is affected by a public interest."

Comment. The principle of the police power of the state is here stated clearly and categorically, and also the principle of the public's interest in private property. Eminent domain is asserted by implication.

Freedom of Action — License — Police Regulations

(A decision of the Appellate Division of the Supreme Court.)

New York Times, July 23, 1916.

An agent of the Northwestern Mutual Life Insurance Company sued the company for $200,000 for breach of contract in that it had employed him for a term of years from January 11th, 1907, to December 31st, 1916, but had discharged him on July 7th, 1914.

The company declared that the agent was discharged because his license had been revoked by the Insurance Department of the state. Without such a license, no agent can conduct an insurance business. The agent declared that the revocation of his license was brought about by the general agent of the company for the purpose of making the agreement void. The claim that the company had acted in this fashion was not made in the formal complaint. For this reason and for others, the court held that, the company not being a party to the contract between the agent and the State Insurance Department, it was made impossible for the insurance company to keep its contract.

"It is like the case of *People* v. *Globe Mutual Life Insurance Company* (91 New York 175) where the appointment of a receiver made the agent's contract impossible of performance and where the court said: 'The State, by the injunction order operating alike upon the company and its agents, paralyzed the action

of both contracting parties so that neither could perform by putting the other in the wrong. Thereupon the company could not refuse and did not refuse!' "

Another opinion cited read: "What happened was a dissolution of the contract by the sovereign power of the State rendering performance on either side impossible. And this result was within the contemplation of the parties, and must be deemed an unexpressed condition of their agreement." (Verdict for the Company.)

Comment. It might well have been that the Company acted in collusion with the State Insurance authorities to have the agent's license revoked so as to escape its obligations to him under contract. It is not asserted here nor denied. It is simply a possibility; and if it were true would call for reform and various safeguards. But this would not invalidate the principle that an annulment of power to act, by the State, relieves all under its authority of responsibility to act. It is an admirable illustration of eminent domain in one of its less usual aspects, as set forth in the conclusion of this classification.

Equal Protection — Liquor License

GIOZZA *v.* TIERNAN

SUPREME COURT OF THE UNITED STATES, 1892

(148 U. S. 657.)

Francois Giozza claimed that he was denied the equal protection of the laws and that he was deprived of his

property without due process of law, in that he was fined $450 for selling liquor without a license, as required by the laws of Texas. He was seized and held on his failure to pay the fine but applied for and obtained a writ of *habeas corpus*. In the petition for this writ he sets forth his complaint.

It appears that, under the laws of Texas, no person is permitted to obtain a license to pursue the occupation of selling liquor until he has given bond in the sum of $5,000 payable to the state, and containing the condition that he will not sell liquor to any one whose wife, mother, daughter, or sister has notified him through the sheriff or other proper officer, not to sell. Such wife, mother, etc., is entitled to recover $500 damages for an infraction of this condition.

The petitioner also alleged that he was unjustly required to pay an occupation tax for twelve months in advance, whereas, in other businesses, this tax was paid quarterly.

The laws of the state had been pronounced valid and constitutional.

The annual tax for selling liquor in amounts less than a quart, was $300, the occupation tax $150. Giozza had paid neither.

Chief Justice Fuller in his opinion said, *inter alia*, "Irrespective of the operation of the federal Constitution and restrictions asserted to be inherent in the nature of American institutions, the general rule is that there are no limitations upon the legislative power of the legislature of a State, except those imposed by its

written constitution." There is nothing in the Constitution of Texas restricting the power of the legislature to make any liquor laws it sees fit, but it is contended that the act conflicts with the provisions of the Fourteenth Amendment, that "no states shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any states deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

"The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States, and the right to sell intoxicating liquors is not one of the rights growing out of that citizenship.

"The amendment does not take from the States those powers of police that were reserved at the time the original Constitution was adopted . . . it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens, and to promote their health, morals, education and good order. . . . Nor, in respect of taxation was the amendment intended to compel the State to adopt an iron rule of equality. . . . It is enough if there is no discrimination in favor of one as against another of the same class (cases cited). And due process of law within the meaning of the amendment is secured if

the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

The decree of the Circuit Court was affirmed.

Comment. Chief Justice Fuller asserts for the individual states the ancient principle of sovereignty, — "the King can do no wrong" but the Fourteenth Amendment is a plain countervailing principle. However the declaration that "the right to sell intoxicating liquors is not a right growing out of citizenship" in the United States settles this particular problem. The police power of the individual states is as imperative as that of the United States so long as there is no class discrimination and no discrimination against an individual.

Police Regulations (2)

Labor Unions

UNDERWOOD *v.* TEXAS PACIFIC RAILWAY CO.

COURT OF CIVIC APPEALS OF TEXAS, 1915

(178 Southwestern Reporter 38. 189 Bul. Lab. St., 156.)

J. A. Underwood and others sued for a writ of injunction against the defendants to obtain relief from the continued carrying out of a contract of agreement between the railway companies and the Brotherhood of Railway Trainmen, and for a decree declaring the agreement to be void. The plaintiffs declared that they were proficient railway switchmen, and were industri-

ous, etc., and had been unable to secure work when they applied because they were not members of the brotherhood. As to reasons assigned for illegality of the contract the court's opinion, by *Judge Rainey*, says:

"Complainants further charge that said purported contract between the Brotherhood of Railway Trainmen and defendant railroads is illegal and void, as being without consideration, against public policy, discriminatory, preventive of competition and of the freedom of contract, creative of a monopoly of labor, destructive of the liberty and property of the complainants, and creative of a combination in the interest of monopoly to prevent the employment, as well as to compel the discharge of competent men who were willing to work, but who were not members of the Brotherhood of Railway Trainmen, that its continued enforcement by the railroads and the Brotherhood of Railway Trainmen will work irreparable injury to complainants, and that they have no adequate remedy at law."

The railway companies admitted an agreement by them with the brotherhood, which provided that they would give preference to members of the brotherhood to the extent of 85 per cent in the case of one company and 75 per cent in the the other case, making no change in the men employed at the time of the contract, but accomplishing the result in the hiring of men as vacancies occurred. They denied any agreement or understanding between themselves with reference to the matter.

The Brotherhood of Railway Trainmen submitted that it represented nine-tenths or more of the workmen concerned and that its contracts with the several defendants herein, wherein it has sought to provide for a percentage employment basis of its members, is not only not discriminatory as to non-members of its order, but, on the other hand, is exceedingly fair and just, and, if there be discrimination in said percentage, it is against the defendant rather than those who are not its members.

The trial court refused to issue the injunction. The court of appeals affirmed the judgment in favor of the defendants, *Judge Rainey* stating the findings of fact and conclusions of law. After stating the terms of the contract, he said:

"There is nothing to show that there was any conspiracy and combination between the appellees which contravenes any law of this State or of the United States. There is nothing in the contract which interferes with the interests of society nor interferes unlawfully with the liberty of appellants to pursue their chosen avocations consistent with the rights of others. The law gives to the railroad companies the right of contract and the same right to all other legal organizations so long as such contracts they make are not violative of law. Our statutes authorize laborers to associate themselves together, form trade-unions, etc., for their protection, in their respective callings. (Penal Code, art. 1477.) Article 1479 provides that the antitrust law shall not interfere with the terms and conditions of

contracts relating to private contracts as to service of employment between employer and employee. The contract between the railway companies and the Brotherhood of Railway Trainmen was legal, it being for the benefit of the individual members of that order in securing work and for the railways in securing skilled and efficient workmen to protect their interest.

"The evidence does not show that they would have been employed by the railroads had there been no contract with the Brotherhood of Railway Trainmen. Appellants merely show that the railways gave as an excuse for not giving them employment that they were not members of the Brotherhood of Railway Trainmen. This the railways had the right to do. They were free to employ whom they pleased, and this right cannot be questioned, not being connected with any conspiracy or combination against any individual or organization to prevent employment.

"The decisions of this State and the United States, we think, make clear the distinction between the two classes of contracts in regard to labor, where such are legal and those affected by conspiracy, etc. There is reason in contracting with the Brotherhood of Railway Trainmen, for its membership greatly exceeded the membership of any other particular union, which was a guaranty of keeping a full working force. But the contract is not exclusive, and provides for only a certain per cent of Brotherhood of Railway Trainmen, and the evidence shows appellees have a larger per cent

of other classes employed than of the Brotherhood of Railway Trainmen in proportion to membership.

"Where Congress and several of the States have enacted laws attempting to limit the power of corporations and individuals in regard to making contracts for labor as they see fit such laws have been held unconstitutional by the appellate courts." [*Coppage* v. *Kansas*, 236 U. S. 135 Sup. Ct. 240 (Bul. No. 169, p. 147; other cases cited).]

A quotation of some length is made from the Coppage case, and the opinion concludes:

"The contract here is not against public property, as it in no way affects the real needs of the people in their health, safety, comfort, or convenience."

Comment. Here there is a conflict between cases of liberty of contract and it is made clear that the principle of decision is practically the same as in the English case of Mogul Steamship Company (*q.v.*) viz.: if the public interest is at stake, liberty of contract, of any sort whatsoever, must go. Facts alone are important here. The principle is established.

COPPAGE *v.* KANSAS

United States

(35 Supreme Court Reporter, 240.)

This decision declared unconstitutional a state statute which prevented an employer from forcing an employee to agree not to join a trade union during his term of employment.

The facts of the case are briefly as follows: In 1903 a Kansas statute was passed making it a misdemeanor for any employer to require a worker to agree not to join a labor union or remain a member of such, as a condition of obtaining or retaining a position. On July 1, 1911, T. B. Coppage, superintendent of the St. Louis and San Francisco Railway Company at Fort Scott, Kansas, requested A. B. Hedges, a switchman, to sign an agreement that he would withdraw from the Switchmen's Union of America and remain outside of its ranks so long as he was employed by the Company. Hedges refused to comply and was discharged. Legal proceedings followed. The case finally reached the Kansas Supreme Court, where the constitutionality of the statute was upheld. On January 25th, 1915, this judgment was reversed by the Supreme Court of the United States. *Justice Holmes* dissented on the same grounds as in the Adair Case of 1908 (*q.v.*) and *Justice Day* issued a separate dissenting opinion, concurred in by *Justice Hughes.*

Justice Pitney, for the majority opinion, contended that the statute in question constituted an interference with liberty of contract guaranteed by the Fourteenth Amendment, and thus must be deemed to be arbitrary, " unless it be supported as a reasonable exercise of the police power of the state." A statute, he declared, may be sustained as a legitimate exercise of this police power if it is passed to prevent coercion and to promote the public health, morals or general welfare of the people. He found that there was no such condition here existing.

Justice Holmes held that the statute, far from interfering with freedom of contract, might be looked upon as actually preparing the way for such freedom. "In present conditions a workman may not unnaturally believe that only by belonging to a union can he secure a contract that shall be fair to him. If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins."

Justice Day declared that the right of contract was not absolute. Since this statute simply protected the legal right of an employee to join a union its passage could not be considered an abuse of legislative power. Coercion is present when an employer forces an employee to sign an agreement or lose his job. "In view of the relative position of employer and employed, who is to deny that the stipulation here insisted upon and forbidden by the law is essentially coercive?"

Comment. It is important to notice two points, viz.: — That, both the decision of the court and the dissenting opinions lay stress upon freedom of contract, and 2. That by this decision the freedom of contract is actually limited.

Police Power in General

STATE *v.* J. J. NEWMAN LUMBER CO.

SUPREME COURT OF MISSISSIPPI, 1912

(59 Southern Reporter, 923. 112 Bul. Lab. St., 102.)

The defendant was a corporation operating a saw and planing mill plant and a logging railroad and also shops for the repair of the machinery used. They had worked their men in excess of 10 hours per day, which was in violation of the statute except for emergency, or cases of public necessity. The facts were not disputed. They challenged the constitutionality of the law in the Supreme Court of Mississippi, but the law was sustained at all points by an undivided court. *Judge Reed* delivered the opinion, a part of which follows:

"There has been already in this country much discussion of the laws, like the statute now before us, commonly known as 'labor laws.' It seems to be settled that the legislatures of the States have the power to enact proper laws to regulate and provide for the 'safety, the health, the morals, and the general welfare of the public.'

"It is incumbent upon the legislature to enact all laws necessary for regulating the conduct of the people and the proper use of their property. It is often true that persons will deem their liberties abridged, or

the unlimited enjoyment of their property interfered with. Since the beginning of government this has been so. It will continue so long as persons decide from a selfish standpoint, and not from a consideration of the welfare of all citizens. It is the duty of the legislature to consider the interests of all — what is best for society generally. As seen in the foregoing quotation from our State constitution, it is enjoined upon the lawmakers that 'government is instituted solely for the good of the whole.' They are necessarily the judges of what is for the good of the citizens.

"It is not for the court to decide whether a law is needed and advisable in the general government of the people. This is being more and more recognized by the courts in their consideration of questions of constitutionality. In a recent case the United States Supreme Court, speaking through *Mr. Justice Holmes,* said: 'In answering that question, we must be cautious about pressing the broad words of the Fourteenth Amendment to a dryly logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it is often difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the

latter a *nolumus mutare* as against the law making power.'

"It is certainly true that the power of the State to enact laws for the government of its people, which is usually called the police power of the State, extends at least to the lives, the health, the general welfare and safety of the public, and against the wrongful or injurious exercise by any citizen of what he may deem his rights. The Supreme Court of the United States has 'with marked distinctness and uniformity recognized the necessity growing out of the fundamental conditions of civil society of upholding State police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens.'

"It is said in the case of *Gundling* v. *Chicago,* 177 U. S. 183, 20 Sup. Ct. 633, that 'regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be, and to what particular trade, business, or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and, unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizens are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the

power of the State to pass, and they form no subject for Federal interference.'

"In the case of *Holden* v. *Hardy,* 169 U. S. 366, 18 Sup. Ct. 383, it is decided that 'the protection of the health and morals, as well as of the lives, of citizens, is within the police power of the State legislature.'

"*Mr. Justice Brown,* in delivering the opinion of the court, discusses the progress in our laws and the necessity for changes as new conditions arise, and referring to these he said: 'They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that, while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent flexible and exceedingly difficult of amendment, should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens, as they may deem best for the public welfare, without bringing them into conflict with the supreme law of the land.'

"It is also well known that in the progress of society the relations between employer and employee have changed. Such a law as that before us in the instant case may not have been needed half a century ago, but may be needed at the present time. In fact, the department of the government of this State, known as the legislature, has decided that the law is needed."

Comment. This case is valuable as containing so many important opinions, cited by Judge Reed, upon the meaning and extent of the police power of the state. The principle is applied here that, except where the Federal State's interest is paramount, the principle of police power extends to the several states and, one might add by implication, to the minutest subdivisions of the state. The most interesting thing from a sociological point of view, is the slowly developing duel between the legislative and the constitutional power as expressing the ultimate will of a state. Under present methods of interpretation the duel will never be fought *à outrance*. The particular offense here need hardly be noted. It is not working men in excess of a certain given number of hours which is the fundamental offense but the doing of anything which militates against the safety, honor and welfare of the people as a whole. The police power principle has developed until it may well be called a statement of sociological law. Various things are approved or disapproved, wisely or unwisely, temporarily or over long periods, merely as they are conceived to influence the welfare of the group.

Trust Regulations — Monopoly in Restraint of Trade

UNITED STATES *v.* STANDARD OIL CO. OF NEW JERSEY

173 Fed. Rep. 177, 1909

(221 U. S. 1, 1910.)

"In 1899 the stockholders of the Standard Oil Company of New Jersey owned a majority of the stock of 19 other corporations in the same proportion that they

owned the stock of the Standard Company and these 20 corporations controlled, by the ownership of the majority of their stock or otherwise, many other corporations. Each of these corporations was engaged in some part of the business of producing, buying, refining, transporting and selling petroleum and its products, and they were conducting about 30 per cent. of the production of the crude oil and more than 75 per cent. of the business of purchasing, refining, transporting, and selling petroleum and its products in this country. Many of them were engaged in commerce in these articles among the several states and with foreign nations, and were naturally competitive.

" During the 10 years prior to 1879, the 7 individual defendants had acquired control of many corporations, partnerships and refineries that had been competing in this business, had placed the majority of the stock of these corporations and the interests in property and business thus obtained in various trustees, to be held and operated by them for the stockholders of the Standard Oil Company of Ohio, one of the 19 companies in which the individual defendants were principal stockholders, and had thereby suppressed competition among these corporations and partnerships. In 1879 they and their associates caused all the trustees to convey their interests in the stock, property, and business of all these corporations to 5 trustees, to be held, operated, and distributed by them for the stockholders of the Standard Oil Company of Ohio.

From 1879 until 1892 they prevented these corporations and others engaged in this business, of which they secured control, from competing in this commerce, by causing the control of their operations, and generally of a majority of their stocks, to be held in trust for the stockholders of the Standard Company of Ohio, and from 1892 to 1899 they accomplished the same result by a similar stockholding device and by the joint equitable ownership of the majority of the stocks of the corporations.

"In the year 1899, the 7 individual defendants and their associates caused the majority of the stock of the 19 corporations to be transferred to the Standard Oil Company of New Jersey in exchange for its stock, so that the latter company thereby acquired the legal title to a majority of the stock of each of the 19 companies, the control of these companies and of all the companies which they controlled, and the power to fix the rates of transportation, and the purchase and selling prices of petroleum and its products, which all these corporations should pay and receive in the conduct of their business in commerce among the states and with foreign nations. Since that exchange of stock the 7 individual defendants have been and are stockholders and officers of the Standard Company of New Jersey, which has exercised, and is still using, that power, and by its use has prevented, and is still preventing, competition in commerce among the states and with foreign nations among these corporations.

"*HELD*, the transaction constituted a combination and conspiracy in restraint of, and to monopolize, commerce among the states and with foreign nations, in violation of sections 1 and 2 of the anti-trust act of July 2nd, 1890 (Act July 2, 1890, c. 647, 26 Stat. 209, U. S. Comp. St. 1901, p. 3200), and the government is entitled to an injunction against the farther continuance and operation thereof." (The above syllabus was made by the Court and is quoted from pp. 177–8 of 177 Federal Reporter. G.C.C.)

The case was appealed to the Supreme Court of the United States and in an opinion delivered by *Mr. Chief Justice White,* was confirmed May 15th, 1911, with some modifications. With the purely legal aspects of the case and with the intervening legal history we have no concern. As was said in another case, the terms "restraint of trade" and "attempts to monopolize" took their origin in the common law. There had been doubt as to whether there was a common law of the United States governing the making of contracts in restraint of trade and the Anti-Trust Act was passed to remedy this defect. For the English law at this time see *Mogul Steamship Co.* v. *McGregor.*

The United States has followed the line of development of the English law but the divergence, purely on the grounds of law, between this case and the one just cited, is noteworthy.

Comment. With the wisdom of the course pursued by the government in such prosecutions as this we have here nothing to do. The case is not cited as an "awful ex-

ample " but merely to illustrate the fact that, if the policy of the state is to require competition, a manifest close monopoly, of the skillful character of this one, cannot and will not be sustained. Nor it is pertinent to reflect upon the subsequent fortunes of the owners of the Standard Oil stock after the " dissolution " of the " monopoly." We have here nothing to do with the effectiveness of the measures taken to prevent monopoly but only with the apparent fact that, believing monopoly in restraint of commerce to be prejudicial to the best interests of the state, the state uses all its means to suppress the monopoly. Compare the following case and the comment upon it.

Conspiracy — Monopoly

MOGUL STEAMSHIP CO., Ltd. *v.* McGREGOR

In the Court of Appeal, 1889

(23 Q. B. Div., 598.)

The defendants were a firm of ship owners trading between China and Europe, who with a view to obtaining for themselves a monopoly of the homeward tea trade, and thereby keeping up a rate of freight, formed themselves into an association, and offered to such merchants and shippers in China as shipped their tea exclusively in vessels belonging to members of the association a rebate of 5 per cent on all freights paid by them. The plaintiffs, who were rival ship owners trading between China and Europe, were excluded from

all the benefits of the association, and in consequence of such exclusion sustained damage.

There was no question as to the facts. On a particular occasion the plaintiffs sent two of their ships, the *Pathan* and the *Afghan,* to Hankow in order to obtain freight. The defendants thereupon sent several of their ships to Hankow with instructions to cut under the rates of their rivals even though they had to carry freights at a great loss. This was done and suit was thereupon brought.

Lord Coleridge gave judgment for the defendants, thus confirming the right of association and refusing to acknowledge conspiracy or monopoly. 21 Q. B. Div. 544.

In his decision *Lord Coleridge* called attention to the public service rendered by the defendants in running steamers regularly all the year round from China to England and back again. This they could not have done had they not had a practical monopoly of the tea trade.

"If the combination is unlawful, then the parties to it commit a misdemeanor, and are offenders against the state; and if, as a result of such unlawful combination and misdemeanor, a private person receives a private injury, that gives such person a right of private action."

. . . "I do not doubt the acts done by the defendants here, if done wrongfully and maliciously, or if done in furtherance of a wrongful and malicious combination, would be ground for an action on the case

at the suit of one who suffered injury from them." But this was a lawful proceeding. There is no evidence of coercion or bribing. It is not in restraint of trade more than if two tailors in a village agreed to give their customers five per cent off their bills at Christmas on condition of their customers dealing with them and with them only.

But it has been contended that the motive of the defendants was to ruin the plaintiffs. If so, this is actionable; but all trade is selfish. "Very lofty minds, like Sir Philip Sidney with his cup of water, will not stoop to take an advantage, if they think another wants it more. Our age, in spite of high authority to the contrary, is not without its Sir Philip Sidneys; but these are counsels of perfection which it would be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business. The line is in words difficult to draw, but I cannot see that these defendants have in fact passed the line which separates the reasonable and legitimate selfishness of traders from wrong and malice."

This judgment of *Lord Coleridge* was confirmed in the Court of Appeal by *Bowen and Fry, L. JJ., Lord Esher, M. R.*, dissenting.

Fry, L. J., said *inter alia*: "The stream of modern legislation runs strongly in favor of allowing great combinations of persons interested in trade, and intended to govern or regulate the proceedings of large bodies of men, and thus necessarily to interfere with what would have been the course of traffic if unaffected by

such combinations. I therefore conclude that the combination in the present case cannot be held illegal as opposed to the policy of the law." [1]

Comment. It must be evident to any one that this was precisely a "combination in restraint of trade." Moreover the usual practice of the common law would be to construe malicious intent from the inevitable consequences of the defendants' acts. They may not have *meant* actively to ruin their competitors but they were certainly indifferent if ruin should follow as a necessary consequence of suppressing competition. The whole difference lies in the conception of public policy. It was to the advantage of England and her various possessions that a regular service be maintained between China and London. Law follows this need. Justice Fry's opinion is most complacent.

Hours of Labor

THE BAKERS' CASE

Lochner *v.* New York

198 U. S., 45 (1905)

The indictment averred that the defendant "wrongfully and unlawfully required and permitted an employe working for him in his . . . bakery in the city of Utica . . . to work more than sixty hours a week." He had previously been convicted of the same offense

[1] S. C. T. Dodd in Harvard Law Review, 7 : 162, says: "This case has settled the law of England. In this country, nothing is settled."

which was a violation of what was known as the labor law, section 110. He therefore committed a crime or misdemeanor, second offense. He was convicted of a misdemeanor, second offense, in the County Court and sentenced to pay a fine of $50 or go to jail not to exceed fifty days. Appeals were taken to the Appellate Division of the Supreme Court of New York and to its Court of Appeals, the conviction being affirmed both times. The case then came before the Supreme Court of the United States.

The Court (*Mr. Justice Peckham* delivering the opinion) held that the statute "necessarily interferes with the right of contract between the employer and employees" — the right to purchase or sell labor being guaranteed under the Fourteenth Amendment. "There are, however, certain powers existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere."

In *Holden* v. *Hardy*, 169 U. S. 366, a Utah statute which limited the employment of labor in underground mines to eight hours a day, "except in cases of emer-

gency, where life or property is in imminent danger," was held to be a valid exercise of the police power of the state. The statute of New York has no emergency clause in it and *Holden* v. *Hardy* does not apply. There is a limit to the police power, otherwise it would become a delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not a question of substituting the judgment of the court for that of the legislature. The law involves neither the safety, morals nor welfare of the public and the interest of the public is not in the slightest degree affected by such an act.

The public health is not threatened to an extent to make interference justifiable since the trade of baker is not usually dangerous to health. This is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best. The limitation of hours of labor here has no direct relation to the public health but is aimed at regulating the hours of labor in a private business.

Judgment of the lower courts all reversed and the case remanded to the County Court for further proceedings not inconsistent with this opinion.

Justice Harlan dissented, *Justices White* and *Day* concurring. The exercise of the police power to limit contract is an interference with liberty. There is a liberty of contract which cannot be violated even under direct legislative enactment. But " a decision that the New York statute is void under the Fourteenth Amend-

ment will, in my opinion, involve consequences of a far reaching and mischievous character; for such a decision would seriously cripple the inherent power of the States to care for the lives, health and well being of their citizens. . . . Legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably beyond all question in violation of the fundamental law of the Constitution."

Mr. *Justice Holmes* dissenting.

" This case is decided upon an economic theory which a large part of the country does not entertain. . . . State constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well known writers is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. . . . Some of these laws embody convictions or prejudices which judges are likely to share. But a constitution is not intended to embody a par-

ticular economic theory, whether of paternalism and the organic relation of the citizen to the States or of *laissez-faire*. It is made for people of fundamentally differing views and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. . . . I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly would not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss."

Comment. Here we have the majority opinion and in fact the whole court, with the exception of Justice Holmes, on the side which declares that statutes of this nature, made under the so-called police power, actually do interfere with freedom of contract. Justice Holmes — but in a dissenting opinion only — declares that there are many interferences with the liberty of the citizen much greater than this.

The question has never been fairly faced. "Is there any limit to the police power of the state under a constitutional government?" Perhaps it never will be faced. Justice Peckham did hold that there is a limit to the police power but he hastened to add that there is *here* no conflict between constitution and legislature. The court seems to have been divided on the question of *fact*. If the baker's trade had been, in the opinion of the majority, detrimental to the public welfare, etc., then the famous case would have been decided otherwise. Justice Holmes held that that is a perverse interpretation of liberty of the individual which is allowed to prevent the natural outcome of a dominant opinion. I may be allowed to point out that every case under the Liberty Classification upholds his position; and to issue the challenge to have a case produced which is opposed to it in principle.

Blacklisting

New York Times, July 18, *August* 2 *and other places.*

On July 18th, 1916, the British Government published a list of seventy to eighty business firms and individuals domiciled in the United States with whom residents of the United Kingdom were forbidden to deal. Other countries had formerly been black-listed in the same way.

Modern conditions of credit and commerce make it possible for an enemy outside belligerent territory to trade with his country. It is held to be purely a piece of domestic legislation which interferes with trade even in the case of specified firms, only by prohibiting persons domiciled in the United States from dealing with

these firms. It is a consequence simply and solely of the right of the state to limit or control, in the interests of the state, the trade regulations of its own subjects.

But the outstanding contracts of British Insurance Companies with firms on the British black-list will not be interfered with.

STATE *v.* LAY

SUPREME COURT OF ERRORS OF CONNECTICUT, 1912

(Reported 84 Atlantic Reporter, 522. 112 Bul. Lab. St., 51.)

Charles H. Lay was convicted of violating chapter 163 of the Acts of 1911 of the laws of Connecticut, and appealed. The law in question regulates the conduct of bureaus or agencies maintained by any person, corporation, or association, for the purpose of keeping a record of the "character, skill, acts, or affiliations of any person whereby his reputation, standing in a trade, or ability to secure employment may be affected." Lay was the agent for an association of manufacturers of Hartford County, and maintained a record of the nature described in the statute, and had refused to allow the commissioner of labor to make an inspection when he had requested the same under the provisions of the act. In the course of the trial it was admitted that:

"Said association maintains a central bureau, conveniently located, for two purposes: First, for the pur-

pose of supplying to members of said association suitable employees when and as needed; and, second, for the purpose of furnishing information to members relative to the health, character, reputation, habits, disposition, efficiency, and capacity as wage earners of persons applying to members for employment as such information may be determined, and reported to said association by the former employer or employers of such persons. In determining the history of applicants in this respect, it is customary to accept as final the report of the foreman under whom said persons may have worked; and the persons affected by the record thus obtained concerning them are without any knowledge or means of knowledge of the contents of such report, and do not know whether it is or may be used either in favor of or against them when seeking employment elsewhere."

The contention was made that the act in question was unconstitutional, as violating both the fundamental law of the State and of the United States. The court below refused to adopt this view, and its attitude was sustained by the supreme court, on appeal. *Judge Curtis,* who delivered the opinion of the court, having stated the facts and disposed of certain preliminary matters, concluded his opinion as follows:

"The precise question presented by this record is the validity of this public act in so far as it imposes duties upon the supporters and maintainers of such a bureau as the defendant had charge of to grant an inspection of its records and furnish certain informa-

tion to the commissioner of the bureau of labor statistics as prescribed in the act. The legislature in this act declares by implication that the public welfare requires that the voluntary maintenance of such a bureau should be under such relations to the bureau of labor statistics as the statute provides. This court cannot find that the legislature is wrong in this conclusion. The provisions of this act relating to such duties and rights as pertain to the commissioner of the bureau of labor statistics are not so clearly and manifestly beyond the legitimate field of legislation as to be invalid. The purpose of this legislation in the particulars now under consideration reasonably may have been esteemed by the legislature of such importance to the general welfare for statistical or other lawful purposes of such bureau of labor statistics, under the statute governing it, as to make the provisions relating to the commissioner of the bureau of labor statistics a valid exercise of legislative power."

Comment. Another case of police power. The menace to the liberties of the people here lies in secrecy and arbitrary power. There are black lists in many organizations whose very existence is unsuspected and there are many ways of keeping such lists so that the law cannot reach them; but the principle is evident that the law would reach them if it could. Blacklisting is socially undesirable on the basis of such a decision as this.

Contract and Blacklisting

SEWARD *v.* SEABOARD AIR LINE RAILWAY

SUPREME COURT OF NORTH CAROLINA, 1912

(Reported 75 Southeastern Reporter, 34. 112 Bul. Lab. St., 52.)

R. H. Seward sued the company named to recover damages for preventing or attempting to prevent him from obtaining employment as a locomotive engineer. The suit was based on the provisions of chapter 858, Acts of 1909, which provides a penalty in case any person, agent, company, or corporation, after discharging any employee from its service shall prevent or attempt to prevent by word or writing of any kind such discharged employee from obtaining employment elsewhere, but does not forbid the giving of a truthful statement in writing on request to any person to whom the discharged workman has applied for employment as to the reason of such discharge. Seward had worked for about two years for the defendant company, being discharged on January 9, 1909. Thereafter he applied for employment with three other companies, each of which, with his consent, wrote to his former employer requesting Seward's record. The reply to the three companies was practically the same, showing various suspensions for refusing to go out, for damage to engine, on account of accidents, and for minor offenses, and dismissal on the date above mentioned for leaving

the station on the time of another train, resulting in a head-on collision. In addition to the above it was stated in one of the reports that "this man is now suing the Seaboard Air Line for personal injuries."

Seward was nonsuited in the superior court of Wake County and appealed, contending that the company had no right under the statute to give his record, and could do no more than state the reasons for his discharge, and that if it could give the record of the plaintiff it had not stated it truthfully and was actuated by malice. The company contended that its communications were privileged and not actionable in the absence of malice and that there was no evidence of malice.

The opinion of the court was to the effect that there was sufficient evidence to take the case to the jury, and a new trial was ordered. *Judge Allen,* who delivered the opinion of the court, spoke in part as follows:

"*When we look to the common law, we find that the employer had the right to employ whom he pleased, and to discharge with or without reason, and that the employee could select the person whom he would serve, and had the right to quit the service at pleasure; the only limitation upon the exercise of the right by either being the terms of the contract of service.* (Italics mine. G.C.C.)

"An employer has a right to select his employees according to what standard he may choose, though such standard be arbitrary or unreasonable. An employer certainly has a right to refuse to employ any

one whom he knows to have left another employer in violation of a reasonable rule which both employers are seeking to enforce. . . . There are, however, limitations upon the rights of the employers in this matter. While the employee is bound by the reasonable rules of the employer as a part of the contract of employment, and may be reported to other employers for a breach of those rules, there is a correlative duty upon the employer not to report an employee wrongfully. The rule which enters into the contract of employment is as much a part of the contract of the employer as of the employee, and both are bound by it. The employer is strictly within his rights as long as he reports no employee for a violation of the rule except such as have actually violated it. When, however, he wrongfully makes such a report and an employee is thereby damaged, such employee has a right of action."

"As was said in *Willner* v. *Silverman,* 109 Md. 356, 71 Atl. 964 : 2 ' In furtherance of their common welfare, and in settlement of their ofttimes conflicting interests, both employers and employees stand upon a plane of perfect equality before the law, enjoying the same freedom and amenable to the same restrictions.' When the employee was discharged, he could not require a statement of the reasons for the discharge, and the employer was under no legal obligations to give to anyone, with whom he sought employment, his record or character, while in his service, although he could do so upon request and according to some of

the authorities voluntarily, and there would be no liability in damages if the report was made in good faith and in the belief that it was true, although in fact false; but, if made maliciously, it was actionable.

"The report was regarded as privileged, and, in the absence of express malice, no cause of action could be based on its publication; this doctrine resting on the moral obligation of the employer. The life and limb of the employee were largely dependent on the intelligence, skill, and prudence of his co-employees, and it was the duty of the employer to exercise care to see that no one was admitted to the common employment who was careless or incompetent. The employer owed the same duty to the public, whose lives and property were committed to his care, and this duty could not be performed unless one employer could, without fear of liability, communicate freely his honest belief as to the standing of a discharged employee, and the law therefore said that such communications were presumed to be made in the performance of a duty, and, in the absence of express malice, they could not be made the basis of an action.

"We cannot think it was the intention of the general assembly to withdraw these wholesome safeguards from employees and the public, and that the statute may be effective and will serve a useful purpose without abrogating the principles of the common law. Prior to the ratification of the act of 1909, statements as to the character and competency of discharged employees were frequently made voluntarily, and not

upon request, and were sometimes prompted by malicious motives when the motive was difficult of proof; when malice and the loss of service, as the result of the statement, were proven, the damages were difficult of admeasurement; and when there was no loss of employment, but a mere attempt to prevent the employee from obtaining it, no compensatory damages could be awarded. The act remedies these defects, and under its provisions a statement as to the standing of a discharged employee is not privileged unless made upon request, and whether privileged or not, if made maliciously, and the employer has thereby prevented or attempted to prevent the discharged employee from obtaining employment, the jury may award penal damages.

"Malice or want of good faith is established when it is shown that the matter published was false within the knowledge of the publisher, or malice may be established by showing a bad motive in making the publication; as that it was made more publicly than was necessary to protect the interest of the parties concerned, or that it contained matter not relevant to the occasion, or that the publisher entertained ill will toward the person whom the publication concerned." (Town. S. & L., sec. 245.)

"The employer has the right, under this statute upon request, to give 'a truthful statement of the reason for such discharge,' and we do not give to these words the restricted meaning contended for by the plaintiff, as in our opinion they include the record of

the employee, and if the statement is so made, in the honest belief that it is true, and not maliciously, the employer is protected.

"The Supreme Court of Texas, in discussing a similar statute, says in *Railroad* v. *Hixon,* 137 S. W. 345: 'By the term, "a true statement" of the cause of his discharge, is meant the employer shall give fairly, honestly, and in good faith the ground or cause upon which the master has acted. *It was meant that he should not be permitted to discharge for one reason, and, when called on to give a statement thereof, assign a different reason.*'

"Applying these principles to the evidence, and it appearing that the plaintiff admits that he was suspended for alleged misconduct 165 days during a service of a little less than two years with the defendant, that he was given a hearing as to each charge, and knew of the record that was made against him, and that the Brotherhood of Locomotive Engineers, of which he was a member, refused to prosecute his appeal when he was finally discharged, we would not hesitate to affirm the judgment of nonsuit but for the fact that the plaintiff says that the charges contained in the report made by the defendant are not true, and the further fact that the defendant incorporated in its letter of July 9, 1909, written by its superintendent, Poole, the statement, '*and will state further that this man is now suing the S. A. L. for personal injury,*' which could not be a part of the record of the plaintiff while in the employment of the defendant, nor a reason for his discharge, as the

suit was instituted after he left the service of the defendant.

"It is not a sufficient answer as to the effect of this evidence to say that the statement is true, as it was not information the defendant was requested to give, and did not bear on the character or competency of the plaintiff, and was calculated to prejudice him.

"There is also evidence that the action instituted by the plaintiff against the defendant referred to in the letter of July 9, 1909, was to recover damages for personal injuries sustained in a collision, which was one of the most serious charges against the plaintiff; *that this action was settled in October,* 1909, *by the payment of* $1,350 *to the plaintiff, and that thereafter the defendant, in its letter of December,* 15*th,* 1909, *retained this same charge against the plaintiff.*

"These facts at least permit the inference, which the jury are not compelled to adopt, that the defendant would not have paid the sum of $1,350 to the plaintiff voluntarily, on account of injuries sustained in a collision, if he had been guilty of wrongdoing, and that the retention and publication of the charge after the settlement was with knowledge that it was not true. The statute is a wise one and will serve a useful purpose if judiciously administered, but juries in the assessment of damages, when they can be recovered, should mark the line and discriminate clearly between the employee who has honestly endeavored to perform his duty, who is entitled to the highest consideration, and the negligent and reckless employee who is a menace

to his coemployees and the public." (All italics mine. G.C.C.)

Comment. This is a complicated case. The argument of Judge Allen must be read in full if possible. Contract appears here again with the ancient conception of freedom between the parties — and later on we come upon the hoary claim of equality before the law of employer and employee. This claim is somewhat ideal and it is significant of the law's will; but even more significant is the tendency of modern higher courts to recognize the fact of existent inequality with an attempt to weight the side of the weaker so as to bring about something like equality. This is evident in strike and picketing cases. Let me, at the risk of repetition, again emphasize that this study has, as such, no interest in social reform. When we here recognize the fact of the law's endeavor to hold the scales evenly between capital and labor, it is simply the fact which we recognize. The failure of statutes or of common law practice to bring about actual equality is totally irrelevant. Statutes accomplish much when they prevent the grosser "star chamber" proceedings. The plaintiff in this case had no ground to complain of injustice.

Restraint of Trade

MARINELLI *v.* UNITED BOOKING OFFICES, ETC.

U. S. District Court, S. D. New York, 1914

(227 Federal Reporter, 165. 189 Bul. Lab. St., 56.)

H. B. Marinelli (Ltd.) brought action at law for damages against the company named and a number of

other defendants. The latter were alleged to nave destroyed the plaintiff's business by illegal combination in violation of the Sherman Anti-trust Act. The individual defendants were owners of many vaudeville theaters in the United States, roughly arranged in two circuits, an eastern circuit which, together with other theaters, is known as the Keith circuit; and a western circuit, which together with theaters owned by other parties comprises what is known as the Orpheum circuit. The performers in these theaters remain in a theater not more than one week, and are usually booked under a contract which requires them to pass from one theater and from one state to another, taking with them paraphernalia and stage properties. The two corporations named as defendants were booking agents for the two circuits, securing performers to travel about the whole or part of each circuit, and, in general, acting as agents for the managers or owners.

The plaintiff, which maintained offices in London, Paris, and Berlin, as well as in New York, acted as a sort of clearing house between performers and managers and as agents for the former in securing contracts and in arranging for their entrance into the country, the transportation of their apparatus, etc.

It was alleged that the defendants entered into a combination in restraint of their own business. The eastern theater owners were not to employ anyone not booked through the eastern booking corporation, which was not to act for any theater which employed another booking agent. They were to procure the assent of the

other theaters in the Keith circuit to the plan. All were to blacklist performers who played outside the two circuits, and also blacklist theaters that disregarded the blacklist of players. No one was to be employed who had as a representative any person who obtained employment for a performer outside the circuits, and theaters who employed such performers were put under the ban. Such representatives also were blacklisted. Similar allegations were made as to the western circuit, and it was further alleged that the defendants blacklisted the plaintiff, sent out notices to that effect, and destroyed his business.

The court went at length into the question whether the interstate commerce features of the defendant's business were sufficiently prominent, and the results of their acts affected that commerce to such a degree as to bring the matter within the scope of the Sherman Act; the decision was that the act applied.

The court also held that the combination was one in restraint of trade, overruled a demurrer to the complaint and required that an answer be filed.

Comment. Anything which is, or seems to be, a monopoly in the United States of America is always condemned. Also compare the boycott as exercised by the labor unions with the blacklist as used by employers. What is the difference in principle?

JUDICIAL CONSTRUCTION OF FOURTEENTH AMENDMENT

26 Harvard Law Review, 16

(Justice Francis J. Swayze.)

A railroad company may be required to fence its tracks, to protect grade crossings, to stop trains at certain stations, probably to check trains at grade crossings, to elevate its tracks, to build viaducts and tunnels, and when necessary to change their location, to establish stations, to make connections with other roads, to supply even at a loss enough trains and adequate service, to supply local switching service, but not to construct private switches, may be forbidden to heat its cars in a certain way, and may be made liable for damage by fire; whether these requirements are justified under what is called the police power or under the right to regulate public service corporations, they constitute a serious modification of the right of private property, and their cumulative effect has been to impose vast expense upon the companies and to bring about a conception of the right of property very different from that probably entertained by the men who framed the amendment.

(Note — For every clause the decisions actually given may be found in Judge Swayze's article.)

Limits to Property

HUDSON COUNTY WATER CO. *v.* McCARTER

209 U. S. 349

"The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the right of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain."

Mr. Justice Holmes.

Comment. This is because such limitation of height would be practical theft. The state may indeed take *any* property but only — except in extraordinary circumstances, like war — under condemnation proceedings — "due process of law" — with proper compensation.

Franchises

CHARLES RIVER BRIDGE *v.* WARREN BRIDGE

11 Peters (U. S.) 420, (1837)

In 1650, the ferry privilege across the Charles River from Boston to Cambridge was granted to Harvard College. In 1785, the legislature incorporated a company to build a bridge, the company taking tolls to reimburse itself and agreeing to pay Harvard College £200 a year for 40 years to indemnify it for the loss of the ferry privilege. Later an agreement was made to pay this sum for 70 years. The bridge company rigorously kept its contract; but in 1828, 43 years after the company was incorporated, the legislature incorporated another company to build Warren Bridge, taking tolls as in the other case, but eventually to become free (which occurred in due time and according to agreement.) In consequence, the franchise value of the Charles River Bridge was destroyed.

At the time an injunction was sought to prevent the building of the Warren Bridge, afterwards general relief from the situation.

The Supreme Court of Massachusetts dismissed the complaint and the case was taken to the Supreme Court of the United States, where this judgment was *affirmed.*

The Court held that the object and end of all government is to promote the happiness and well being of the community. Government therefore cannot

hamper itself in dealing with the future. It cannot restrain for 70 years the natural growth of the community. The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation.

Comment. Such grants then, it would appear, if made with a proviso, would have less an appearance of injustice. It does not tend to make men keep their contracts inviolably to realize that the government will break its contracts without compunction and without giving damages. Since it is evident that one generation cannot bind its successor in fact, it would be well that no promises should be made by a government without the clear declaration that those promises might be repudiated later; and it would be well also to have courts pass upon the question whether damages would lie for such repudiated contracts.

BUSH *v.* NEW YORK LIFE INSURANCE CO.

135 App. Div. N. Y. 447 (1909)

By a statute of the State of New York a limit was put upon the amount of insurance which could be written by all life insurance companies except "a corporation more than one-half of the outstanding insurance of which on December 31st, 1905, consisted of industrial insurance." This would limit the business of all the large life insurance companies except the Metropolitan.

The details of this case are not important in this connection. The statute was held to be constitutional although that question did not arise in connection with the case.

Justice Ingraham said: "The claim is made that in some way the State of New York is prohibited from restricting corporations that it has created as to the amount of new business which they shall engage in, or limiting them as to the business in which they can engage. I suppose that there could be no question as to the power of the State to grant such power to corporations which it organized as it pleased, or that under the reservation of power by the present Constitution (Art. 8, Sec. 1) the State had the right to amend or modify the charter of any corporation, or repeal or annul said charter altogether; and the fact that either by the original charter or an amendment to the charter of a corporation such corporation was given greater power than that given to other corporations, or that the powers of one corporation were restricted so that it had the right to exercise less power than other corporations organized by the State, was not a violation of any Constitutional right assured to any of the corporations by either the Constitution of this State or the Constitution of the United States."

Comment. Note that the section 96 of the Insurance Law is not considered to be a violation of sections of the Constitution of New York forbidding the passing of private bills — "granting to any private corporation, association or individual any exclusive privilege, immunity or

franchise whatever." It was held that section 96 of the Insurance Law was not a private bill. Nevertheless it is plain that there was discrimination between corporations of a kind which could not be tolerated under the Fifth Amendment to the Constitution of the United States between individuals. It is interesting to note also that this section of the Insurance Law has been considerably modified and its rigors softened.

SLAUGHTER HOUSE CASES.

Supreme Court of the United States, 1872

(83 U. S., 36.)

The legislature of Louisiana in March, 1869, passed an act granting to a corporation, created by it, the exclusive right, for twenty-five years, to have and maintain slaughter houses, landings for cattle, etc., within a large district, containing 1154 square miles, including the city of New Orleans and having a large population. The act further prohibited all other persons within the district from having or maintaining slaughter houses, required all cattle to be brought to this one and exacted certain fees, etc.

The ground of the opposition to the slaughter house company's pretensions was that the act of the legislature made a monopoly and was a violation of the most important provisions of the Thirteenth and Fourteenth Amendments to the Federal Constitution.

When the cases (there were several of them) finally reached the Supreme Court of the United States, *Mr.*

Justice Miller delivered the opinion which held, **1.** That this grant of exclusive right or privilege, guarded by proper limitation of the prices to be charged, and imposing the duty of providing ample conveniences, with permission to all owners of stock to land, and to all butchers to slaughter at those places, was a police regulation for the health and comfort of the people and entirely within the constitution of the State and Nation.

2. Exclusive rights have always been granted when the purpose held in view was the public good.

3. The main purpose of the amendments cited was the abolition of African slavery, but equally to restrain Mexican peonage or the Chinese Coolie trade.

4. Another purpose was to protect from the hostile legislation of the states, the privileges and immunities of *citizens of the United States* as distinguished from the privileges and immunities of citizens of the several states. Those appertaining to citizens of the United States arise out of the nature and essential character of the national government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof; and it is these which are placed under the protection of Congress by this clause of the Fourteenth Amendment.

Comment. Franchises, though granting exclusive rights to the detriment of many individuals, are always upheld if believed to be in the public interest.

Eminent Domain

AMERICAN DIGEST, CENTURY EDITION,
VOL. 18, P. 755, FF.

Eminent domain is the rightful authority which exists in every sovereign to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit as the public safety, necessity, convenience and welfare may demand.
People v. *Humphrey,* 23 Mich. 471.

The power of eminent domain is the right of the sovereign, without the consent of the owner, when necessary, to make private property subservient to the public welfare.
Grévy v. *Cincinnati, W. & Z. R. Co.,* 4 Ohio St. 308.

A state legislature cannot authorize the taking of private property for a merely private use, even upon making compensation. The doctrine of eminent domain allows private property to be appropriated to public use upon compensation being made therefor, but it cannot be taken for strictly private purposes without the consent of the owner whether compensation is made or not. The assertion of a right on the part of the legislature to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest is not promoted thereby, is claiming a despotic power, and one incon-

sistent with every just principle and fundamental maxim of a free government.

(Cited from p. 797 where all the references are given from which this digest was made).

IN RE DEBS.

158 U. S. 564 (1894)

This is the case in which Eugene V. Debs and others were charged with a violation of the Interstate Commerce Act and probably of the Sherman Anti-Trust Act in that by causing strikes and boycotts, particularly against the Pullman Palace Car Co., they obstructed the mails and endeavored to get possession of interstate business. They were charged with intimidating other employees, assaulting workmen, wrecking engines, etc. The business of the stock yards was seriously interfered with, thus imperiling the food supply of the whole country.

An injunction was issued by the Circuit Court of the United States against the perpetration of the above acts; and even against persuasion. Four persons, Debs *et al.*, were found guilty of contempt of court and sentenced to from three to six months imprisonment. They were committed to jail and on the 14th of January, 1895, applied for a writ of *habeas corpus,* which is the matter considered in this place. This writ was denied. *Mr. Justice Brewer* delivered

the opinion of the court. He said that there were two questions of importance to be considered. The first: Are the relations of the general government to interstate commerce and the transportation of the mails such as authorize a direct interference to prevent a forcible obstruction thereof?

The second: — If authority exists, as authority in governmental affairs implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty?

The summing up is alone given:

"We hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mails; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mails; that while it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry

and determination as to the existence and character of any alleged obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority; that such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law; that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of injunction is no substitute for and no defense to a prosecution for any criminal offenses committed in the course of such violation; that the complaint filed in this case clearly showed an existing obstruction of artificial commerce and the transmission of the mail — an obstruction not only temporarily existing, but threatening to continue; that under such complaint the Circuit Court had power to issue its process of injunction; that it having been issued and served on these defendants, the Circuit Court had authority to inquire whether its orders had been disobeyed, and when it found that they had been, then to proceed under section 725, Rev. Stat., which grants power 'to punish by fine or imprisonment — disobedience — by any party or other person, to any lawful writ, process, order, rule, decree, or command,' and enter the order of punishment complained of; and, finally, that, the Circuit Court, having full jurisdiction in the premises, its finding of the fact of disobedience

is not open to review on *habeas corpus* in this or any other court. . . .

The petition for a writ of *habeas corpus* is *Denied.*"

Comment. One of the defendants testified that it was not the soldiers or the old brotherhoods that ended the strike but the United States courts. In taking the leaders from the scene of action the strike was broken. The great body of the strikers never intended rebellion and when the position of the courts was made plain they yielded.

The right of any laborer to quit work was not challenged.

Public House

REX *v.* IVINS,

Oxford Circuit, 1835

(Reported 7 Car. & Payne, 213. Beale, 43, 3d ed.)

Mr. Samuel Probyn Williams went to the Bell Inn at Chepstow on the night of Sunday, the 14th of April, on horseback. The defendant and his wife both refused him admittance.

Godson, for the defendant, admitted that an action might be brought by Mr. Williams personally, as an inn-keeper has no right to refuse admittance to any sober, decent person; but he objected to an indictment.

Coleridge, J. (in summing up). "The facts in this case do not appear to be much in dispute; and though I do not recollect to have ever heard of such an indictment having been tried before, the law applicable to

this case is this: — that an indictment lies against an inn-keeper who refuses to receive a guest, he having at the time room in his house; and either the price of the guest's entertainment being tendered to him, or such circumstances occurring as will dispense with that tender. The law is grounded in good sense. The inn-keeper is not to select his guests. He has no right to say to one, you shall come into my inn, and to another, you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose inn-keepers are a sort of public servants, they having in return a kind of privilege of entertaining travelers and supplying them with what they want." It was objected in this case that Mr. Williams conducted himself improperly and at a late hour of night. He also was asked his name and residence and after giving these added "and be damned to you." The court and jury held that he had not been guilty of such misconduct as would warrant his being excluded from the house.

Verdict Guilty — 20 shillings fine.

Comment. It is of little consequence to us, for our purpose, what form of proceeding was taken against the inn-keeper, whether he was indicted or merely sued for damages, except as it is clear from the sustaining of the indictment that the inn-keeper offended against the general public as well as against the plaintiff Williams. For reasons given in Justice Coleridge's opinion it is evident that the inn-keeper is strictly limited in his liberty to use his own property.

Contract (Labor Unions)

ADAIR *v.* UNITED STATES

208 U. S. 161 (1907)

The charge was that William Adair, agent of the Louisville and Nashville Railroad Company, in discharging O. B. Coppage in October, 1906, unlawfully and unjustly discriminated against him because of his membership in the Order of Locomotive Firemen, and thereby violated a statute of the United States expressly contrived to prevent such discrimination.

The question before the court was "May Congress make it a criminal offense against the United States — as by the 10th section of the act of 1898 it does — for an agent or officer of an interstate carrier, having full authority in the premises for the carrier, to discharge an employe from service simply because of his membership in a labor organization?"

Does this conflict with the Fifth Amendment of the Constitution declaring that no person shall be deprived of liberty or property without due process of law? "In our opinion that section is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the funda-

mental condition that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interest or as hurtful to the public order or as detrimental to the common good."

Adair was privileged to serve his employer as best he could so long as he did nothing prejudicial to the public interest. Cooley in his Treatise on Torts, p. 278, says "It is a part of every man's civil right that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he may make contracts, and if he is wrongfully deprived of this right by others, he is entitled to redress."

An employer has the same right to prescribe terms on which he will employ one to labor as an employee has to prescribe those on which he will sell his labor, and any legislation which disturbs this equality is an arbitrary and unjustifiable interference with liberty of contract.

The Louisville & Nashville R. R. Co. had been held guilty in the lower court. The Supreme Court set aside this verdict and dismissed the case.

There were interesting and important dissenting opinions of *Justices McKenna* and *Holmes*.

Mr. Justice Holmes granted that this case presents a very limited interference with freedom of contract.

"It does not require the carriers to employ anyone. It does not forbid them to refuse to employ anyone for any reason they deem good, even where the notion of a choice of persons is a fiction and wholesale employment is necessary upon general principles that it might be proper to control. The section simply prohibits the more powerful party to exact certain undertakings, or to threaten dismissal or unjustly discriminate on certain grounds against those already employed. I hardly can suppose that the grounds on which a contract lawfully may be made to end are less open to regulation than other terms. So I turn to the general question whether employment can be regulated at all. I confess that I think that the right to make contracts at will that has been derived from the word liberty in the amendments has been stretched to its extreme by the decisions; but they agree that sometimes the right may be restrained. Where there is, or generally is believed to be, an important ground of public policy for restraint the constitution does not forbid it, whether this court agrees or disagrees with the policy pursued.

Comment. A familiar type of condemnation of interference with the liberty of contract; but with the saving clause that such liberty must not interfere with the public welfare. It would only need then for the court to become convinced that the action of the railroad company was an infringement of the liberty of contract for it to reverse this opinion upon the same principle which gave rise to this decision.

UNITED SHOE MACHINERY CO. *v.* LA CHAPELLE

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1912

(Reported 99 Northeastern Reporter, 289. 112 Bul. Lab. St., 56.)

The United Shoe Machinery Co. had made a contract with an inventor, one La Chapelle, by the terms of which the latter was to give his entire services to the company under a contract terminable at the will of either party. One paragraph of the contract bound La Chapelle to assign to the company any and all inventions or patents which he should make during the continuance of the contract and for 10 years thereafter, and for a like period not to engage in any similar business. The contract was continued for about three years, ceasing in 1909. After that time La Chapelle took out a patent for some improvement in shoe machinery and refused to assign the same to the company, whereupon it brought suit to compel the assignment. A decree was awarded the company in the superior court of Suffolk County, and La Chapelle brought exceptions, which were sustained in the supreme judicial court on grounds that appear in the concluding paragraphs of the opinion of the court, which was delivered by *Judge Rugg.*

It was stated first that on account of the fact that the case was before the court on exceptions certain broad issues could not be considered, as whether the

contract was unenforceable because unconscionable, or whether the plaintiff in the conduct of its business formed a monopoly at common law.

The court dismissed the claim made by La Chapelle that his contract was made under duress, and also all question as to the equivalence of the value of services rendered and wages received, as irrelevant.

The plaintiff company was a manufacturer of shoe machinery undertaking to retain control of its product and to restrict competition by selling under an agreement that the purchaser should use only machinery purchased from the company in any plant where its machinery was used.

The contract between the plaintiff and defendant did not relate primarily to interstate commerce. It was for labor and skill alone — one of many similar contracts with individuals, enough to constitute a practical monopoly of skill in that department.

The provision of the contract here sought to be enforced that for 10 years after its termination every invention shall be assigned to the plaintiff savors of restraint of trade. It would choke off the inventive capacity of the defendant for a period so long after his employment ceased that his usefulness to himself or to any competitor would be extinguished in most instances. When this contract is multiplied by substantially all like inventors in the country, its character as aiding the combination is too clear to require further discussion. A single contract for the employment in labor of one person is far away from inter-

state commerce. But when it is alleged La Chapelle undertook to show that his contract had been made under duress, the court held that this was not sufficiently shown, saying, "Whatever may be said as to the illusory character of freedom of contract growing out of economic conditions, the defendant utterly fails to show that he acted under any element of duress."

A question was raised as to the equivalence of the value of the services rendered and wages received during the continuance of the contract, as to which *Judge Rugg* said: —

"It was of no consequence whether the inventions assigned by the defendant to the plaintiff during the term of his employment were equivalent in value to his wages. It was an implied condition of his contract that he should do his best. The value of his work to the plaintiff had no bearing upon any issue raised."

The plaintiff company was a manufacturer of shoe machinery, undertaking to retain control of its product and to restrict competition by selling under an agreement that the purchaser would use only machinery purchased from the company in any plant where its machinery was used. Various questions of monopoly and the right of the owners of patents were discussed, and also the application of the federal anti-trust act to such a situation as was developed. The question of contracts in aid of unlawful monopoly of interstate trade or commerce was discussed, with numerous citations, following which the opinion concluded:—

"The contract which incidentally, collaterally or remotely affects interstate commerce, although indirectly in furtherance of and advantageous to interstate commerce, is not within the scope of the act. It must appear that the effect of such a contract is direct and substantial.

The contract between the plaintiff and defendant did not relate primarily to interstate commerce. It was for labor and skill alone. It had nothing to do with the transportation of goods. But taking the averments of the answer and the proffered evidence to be true, as we are bound to do on this record, it was made by one who had a monopoly of one branch of trade; it was one of many similar contracts with individuals enough to constitute a practical monopoly of skill in that department; it was a necessary link in a chain of contracts essential to the maintenance and preservation of monopoly in interstate trade which had been established by the plaintiff.

Such a case is within the principle announced in *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, 261, 29 Sup. Ct. 280, that the plaintiff comes into a court of equity for aid in enforcing a contract which according to the allegation and offer of proof was intended to be and was in fact an essential part of an illegal scheme. The words of the court in *Swift & Co.* v. *U. S.*, 196 U. S. 375, at 396, 25 Sup. Ct. 276, at 279, are applicable: "The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them,

are enough to give the scheme a body, and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. (*Aikens* v. *Wisconsin*, 195 U. S. 194, 206 (25 Sup. Ct. 3). (See Bul. No. 57, p. 678). The provision of the contract here sought to be enforced that for 10 years after its termination every invention shall be assigned to the plaintiff savors of restraint of trade. It projects itself so far beyond the period of actual employment and payment of wages that it appears to be in aid of the unlawful combination. It would choke the inventive capacity of the defendant for a period so long after his employment ceased that his usefulness to himself or to any competitor would be extinguished in most instances. When this contract is multiplied by substantially all like inventors in the country, its character as aiding the combination is too clear to require further discussion. A single contract for the employment in labor of one person is far away from interstate commerce. But when it is alleged that it is one among others with 90 per cent of all those skilled in a particular manufacture, and that that kind of manufacture is controlled by a combination formed of many previously competing persons which monopolizes all

or substantially all interstate commerce of that kind, the single contract for labor loses its individual aspect in the larger relation it bears to the monopoly in interstate commerce. As a single incident it may be harmless. As an integral part of an unlawful scheme for monopolizing commerce between the states which cannot be perpetuated successfully without contracts of like tenor with all practicing a similar craft, it partakes of the illegality of the scheme.

Comment. It is interesting to note the reference made to what has been said (by courts) about the "illusory character of freedom of contract growing out of economic conditions." The action of the Shoe Machinery Company was found to be in restraint of trade, and the interest of the public demands that the contract be annulled.

Again it is indifferent for our purposes whether the court decided *correctly* or not as to the facts. The principle is evident.

Property Rights in Means of Livelihood

TERRY *v.* McDANIELL

TENNESSEE, 1899

(103 Tenn., 415. Milburn's Curious Cases, 327.)

This is a case where a barber instituted an action of replevin to secure the tools of his trade — in this case a barber's chair, a looking glass and a map of the world!

Decisions of the several states are by no means uniform as to who may be classed as mechanics and what may be treated as mechanics' tools. In Michigan a dentist is a mechanic, but in Mississippi he is not. A pool table in a saloon is held not to be a tool, upon the ground that the saloon could run without a pool table and a pool table could run without a saloon, but not very successfully! In Illinois it was held that a piano was a tool necessary to a music teacher. In New Hampshire that a mirror was absolutely necessary to the occupation of a milliner. In Vermont, it is expressly decided that a barber's chair is exempt as a tool. (*Allen* v. *Thompson,* 45 Vt. 172.) And in Texas, that a chair, mirror and table are barber's tools. (*Fore* v. *Cooper,* 34 S. W. Rep. 341.)

Comment. The significance of all such cases is that interference with the means of livelihood cannot be maintained. Courts uniformly decide that the things which are necessary for the carrying on of a trade cannot be made the subject of execution. The only thing to be established is that the articles in question are truly tools.

Liberty — Trade

GEER *v.* CONNECTICUT

U. S. Supreme Court, 1896 (161 U. S. 519)

The defendant had killed game birds in the open season in a perfectly legitimate manner in Connecticut. He had not shipped them beyond the borders of the

state, which is contrary to the statute; but he had had them in possession for that purpose. And it was decided by various courts and finally by this one, that this was an offense, contrary to the statute, and that the defendant had been properly convicted in the lower court. The statute does not conflict with interstate commerce laws.

Justices Field and *Harlan* wrote dissenting opinions.

White, C. J., after giving a resumé of the "law of nature" with reference to the taking of wild animals, said that while in feudal as well as ancient law the right to acquire animals *ferae naturae* by possession was recognized, this right was subject to governmental authority and control. Pothier, in his treatise on Property says, "In France as well as in all other civilized countries of Europe, the civil law has restrained the liberty which the pure law of nature gave to every one to capture animals who . . . belong to no one in particular," etc.

Blackstone (2 Bl. Com. 1 and 12) in a famous passage has noted that there are some few things which "belong to the first occupant during the time he occupies them and no longer. Such things among others are light, air and water," and he may have a qualified property in wild animals. "But it follows from the very end and constitution of society that this natural right as well as many others belonging to a man as an individual may be restrained by positive laws enacted for reasons of state or for the supposed benefit of the community."

The Chief Justice further said, "The adjudicated cases recognizing the right of the States to control and regulate the common property in game are numerous. The power of the State of Virginia to prohibit citizens of other states from planting oysters within the tide waters of that State was upheld by this court. The authority of the State of Massachusetts to control and regulate the catching of fish within the bays of that State was also maintained, etc."

"The foregoing analysis of the principles upon which alone rests the right of an individual to acquire a qualified ownership in game, and the power of the State, deduced therefrom, to control such ownership for the common benefit, clearly demonstrates the validity of the statute of the State of Connecticut here in controversy."

IV. INTERFERENCE WITH FREEDOM IN PERSONALITY

Speech, New York Times, April 21st, 1916.

Emma Goldman was sentenced in Special Sessions, April 20th, to serve fifteen days in the workhouse for lecturing on birth control. She declined the alternative of paying a fine of $100 and was led out while several hundred sympathizers applauded.

A squad of policemen guarded the courtroom against disturbance, and hundreds came as to a play with Emma Goldman in the leading rôle.

The case was tried before *Justices Herbert, Moss* and *O'Keefe*. Miss Goldman acted as her own counsel. Assistant District Attorney Unger called only two witnesses to prove the complaint, Policemen John Caspers and Louis Schilling, who heard Miss Goldman's lecture at the New Star Casino on April 8th.

In her defense Miss Goldman made several discourses on the moral, social and economic need for birth control. She called only one witness, Leonard Abbott, who was not allowed to testify because he was not at the lecture.

Suffrage

WILLIAMS *v.* MISSISSIPPI

170 U. S. 213

It was declared that the suffrage qualifications in the Mississippi constitution " do not on their face discriminate between the white and negro races, and do not amount to a denial of the equal protection of the law secured by the Fourteenth Amendment to the Constitution, and it has not been shown that their actual administration was evil, but only that evil was possible under them." Cf. also *Giles* v. *Harris,* 189 U. S. 474.

In the Cyclopedia of American Government, Article " Suffrage," Vol. III, p. 446, it is said " If the penalties for disfranchisement decreed by the Fourteenth Amendment were enforced, it would mean the loss of

at least three representatives in Congress to such a state as Louisiana or Mississippi. But Congress is not likely to take upon itself the enforcement of the penalty, for the ratification of those amendments was procured only by counting the vote of states which acted under duress, and the requirement of such ratification as a prerequisite to readmission is considered to have been of doubtful constitutionality. Moreover, serious doubt has been growing as to the justice and the expediency of the suffrage conditions which were forced upon the southern states. The foremost leaders among the negroes themselves have avowed their approval of both property and educational tests, if fairly administered, since each of them would serve as a spur to greater efforts on the part of the negroes in thrift and education."

LOUISIANA — 1898

Art. 197, Sec. 5

"No male person who was on January 1st, 1867, or at any date prior thereto, entitled to vote under the Constitution or statutes of any state of the United States, wherein he then resided, and no son or grandson of any such person not less than twenty-one years of age at the date of the adoption of this Constitution, and no male person of foreign birth, who was naturalized prior to the first day of January, 1898, shall be denied the right to register and vote in this State by

reason of his failure to possess the educational or property qualifications prescribed by this Constitution."

NORTH CAROLINA

State Constitution, 1915

Article VI, Section 1. — Every male person born in the United States, and every male person who has been naturalized, twenty-one years of age, and possessing the qualifications set out in this article, shall be entitled to vote at any election by the people in the State, except as herein otherwise provided.

Section 4. . . . But no male person who was on January 1st, 1867, or at any time prior thereto, entitled to vote under the laws of any State in the United States wherein he then resided, and no lineal descendant of any such person, shall be denied the right to register and vote at any election in this State by reason of his failure to possess the educational qualifications herein prescribed.

Virginia — 1902

Article II, Sec. 19

Every male citizen of the United States having the qualifications of age and residence required in section Eighteen shall be entitled to register, if he be: —

First: — A person who, prior to the adoption of this Constitution, served in time of war in the army or navy of the United States, of the Confederate States, or of any state of the United States or of the Confederate States; or

Second — A son of any such person; or,

Third — A person, who owns property, upon which, for the year next preceding that in which he offers to register, state taxes aggregating at least one dollar have been paid; or

Fourth — A person able to read any section of this Constitution submitted to him by the officers of registration and to give a reasonable explanation of the same; or, if unable to read such section, able to understand and give a reasonable explanation thereof when read to him by the officers.

Comment. It is exceedingly difficult to discover, in the statutes of the states south of Mason and Dixon's line, direct abridgments of the rights of negroes under the Fourteenth and Fifteenth Amendments to the Constitution. The few citations here given will, however, be sufficient to indicate the sources for the conviction, very generally held and not disputed, that the liberties of negro citizens, as guaranteed by the Fourteenth Amendment, are in fact completely ignored in most southern states, especially in those with a very large negro population. By such expedients as the "Grandfather Clause" so called, and by many others not directly traceable, southern states do disfranchise the great body of their negro population. I am not concerned here either to condemn or to condone the fact. The fact is all that concerns our present purpose, together with its cause, —

which is, without question, the determination on the part of white voters, not to be nullified or dominated by the blacks. The Constitution is disregarded with the full knowledge and connivance of the North. There was a time when the " bloody shirt " was waved on all occasions by certain northern politicians and loud promises were made that the political freedom of the blacks would be made actual as well as nominal; but the north was not free from blame and the present anomalous situation is practically acquiesced in by all concerned. It must then be observed that, constitutional guaranties to the contrary notwithstanding, there is no suffrage equality in the United States. The liberty of a large number of citizens, as defined by the Constitution, is abridged in the interest of the public peace.

COMMONWEALTH *v.* SILSBEE

Supreme Judicial Court of Massachusetts, 1812

(Reported 9 Mass., 417. Beale, 41, 3d ed.)

The offense was that the defendant at Salem, for the choice of town officers, " did then and there, wilfully, fraudulently, knowingly and designedly give in more than one vote for the choice of selectmen, etc."

He was convicted and moved in arrest of judgment.

The Supreme Court confirmed the judgment and fined him ten dollars together with the costs of prosecution.

The defense was on technical points of the law, there being no denial that the defendant had knowingly

cast more than the one vote to which he was entitled.

The Court said, "There cannot be a doubt that the offense described in the indictment is a misdemeanor at common law. It is a general principle that where a statute gives a privilege, and one wilfully violates such privilege, the common law will punish such violation. In town meetings every qualified voter has equal rights, and is entitled to give one vote for every officer to be elected. The person who gives more infringes and violates the rights of the other voters, and for this offense the common law gives the indictment; and the conclusion of the one at bar is proper for the case."

COMMONWEALTH *v.* CALLAGHAN

General Court of Virginia, 1825

(Reported 2 Virginia Cases, 460. Beale, 46, 3d ed.)

Two justices of Allegheny County, Callaghan and Holloway, were candidates, the one for commissioner of revenue, the other for clerk of court, and they made a bargain to vote for one another and did so vote. It was alleged in the indictment that they acted wickedly and corruptly, in making this bargain.

There was an act of the General Assembly, entitled "an act against buying and selling offices" (1792). The Court decided that the offense did not fall within this act "because the plain construction of the statute is that the penalties which it denounces are incurred

only by those who receive or take either directly or indirectly, any money, profit, etc., or the promise to have any money, profit, etc., to their own use or for their own benefit. In this case it appears that the promise of each of the defendants to the other, which constituted the consideration of the vote of that other, inured not to the benefit of the defendants or either of them but to the benefit of others. If indeed it had been alleged in the information that the persons for whom the votes were given, were, if elected, to have held them upon any agreement, that the defendants should in any degree participate in their profits or receive from the holders of them any benefit or advantage, the case would have been different, for then the defendants would have received a profit indirectly, and thus would have fallen within the statute; but there is no such allegation." But the court held that the offense stated in the information was a misdemeanor at common law. "The acceptance of every office implies the tacit agreement on the part of the incumbent that he will execute its duties with diligence and fidelity. . . . All officers are punishable for corruption and oppressive proceedings, according to the nature and heinousness of the offense, either by indictment, attachment, action at the suit of the party aggrieved, loss of their offices, etc. . . . Further, all willful breaches of the duty of an office are forfeitures of it, and also punishable by fine, because every office is instituted, not for the sake of the officer, but for the good of another or others; and therefore, he

who neglects or refuses to answer the end for which his office was ordained should give way to others, and be punished for his neglect or oppressive execution." (Punishment is not here indicated).

Comment. Suffrage cases do not contain any philosophizing. They are apt to be mere violations of a statute and the reasoning which led to the statute is supposed to be understood.

Liberty in Family Relations

"TEACHER–MOTHER" QUESTION

INFORMATION ANNUAL, 1915, p. 126

John H. Finley, State Commissioner of Education for New York, decided on January 11 in the case of Mrs. Peixotto, that a teacher may not be dismissed because she absents herself from school to bear a child. Under existing laws, there was no appeal from this decision. At a meeting of the Board of Education, held in New York City, January 27, action on the teacher-mother question was deferred. On January 28 Supt. Maxwell offered Mrs. Peixotto her former position. Mrs. Peixotto resumed her duties as teacher in New York's public schools February 1.

The Board of Education, February 10, restored to duty Mrs. Lora M. Wagner, of the Curtis High School, who was suspended on November 12, 1914, and sixteen other mother teachers in line with Commissioner

Finley's recent decision. This left no mother teacher suspended or dismissed, against whom no charges but absence to bear children had been made.

An amendment to the by-laws of the Board of Education was made, February 24, providing that leave of absence of two years, without pay, may be granted by the Board of Superintendents to principals and teachers for the purpose of bearing children. This required the repeal of the section of the by-laws which has prohibited the appointment of married women as teachers.

The appeal of Mrs. Henrietta Rodman de Fremery, usually known as Henrietta Rodman, was dismissed and her suspension by the New York Board of Education from November 13, 1914, to September 1, 1915, without pay, was affirmed on June 8th by Dr. John H. Finley, Commissioner of Education. Charges were preferred against Henrietta Rodman for publishing in a New York paper a letter which characterized the action of the Board of Education in its consideration of the teacher-mother cases as "mother-baiting."

The Chicago school management committee instructed Superintendent Ella Flagg Young, March 12, to draw up a new rule providing that teachers in public schools may become mothers without suffering the loss of their positions; but once mothers they must stay out of the schools for two years and devote these years entirely to the child's interest. When returning to

school duties they must show that the child is receiving proper care and not being neglected because of its mother's teaching activities.
New York Times.

Mrs. K. E., instructor in physical training in Erasmus Hall High School, Brooklyn, N. Y., was dismissed in 1913. When Mrs. E. knew that she was about to become a mother she applied for leave of absence without pay, giving her reason. Leave of absence was refused her, although it was intimated to her that if she would make a new application giving "ill health" as her reason, it would be allowed her. The reason for this attitude was that the Board of Education would not go on record as giving a teacher leave to bear a child.

Mrs. E. made a test case of her application. After the birth of her child, on the following September, she returned to school and taught there, without pay, until December, when she was notified that she had been summarily dismissed from the force.

Mrs. G., clerical assistant at the Curtis High School, New Brighton, Staten Island, N. Y., was dismissed from the service by the Board of Education on January 1, 1914, because, as alleged, she made false statements about her absence from the school, which was due to the birth of her child. The vote for her dismissal was unanimous, the women commissioners voting with the others.

Association

IN RE OPINION OF THE JUSTICES (HOUSE DOC. NO. 377)

SUPREME JUDICIAL COURT OF MASSACHUSETTS

(MAY 8, 1912)

(98 Northeastern Reporter, page 377. · 112 Bul. Lab. St., 118.)

At the session of the legislature of Massachusetts held in 1912 there was considered by that body a bill practically identical in form and effect with the first paragraph of the fourth section of the British Trade Disputes Act of 1906. The bill was as follows: —

An action against a trade union or an association of employers or against any members or officials thereof on behalf of themselves and of other members of a trade union or association of employers in respect to a tortious act alleged to have been committed by or on behalf of a trade union or association of employers shall not be entertained by any court.

This was referred to the supreme judicial court of the state with the question as to its constitutionality if enacted, the question being answered by a unanimous bench in the negative.

The opinion of the court is given in full:

The Constitution of the United States in Article 14 of the Amendments, expressly provides that: No state shall "deprive any person of life, liberty, or property,

without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Absolute equality before the law is a fundamental principle of our own Constitution. Frequent expressions to this effect are found in various articles. For example, it is said that "all men are born free and equal"; that "each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws"; that "every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character"; and that the several departments of government are separated "to the end it may be a government of laws and not of men." — Declaration of Rights, arts. 1, 10, 11 and 30.

The proposed bill to exempt associations of employers and trade unions and their members and officials from actions of tort committed by or on behalf of such association or union is plainly contrary to these constitutional guaranties. It gives to certain favored ones, selected arbitrarily, immunity from that equal liability for civil wrongs which is a sign of equality between citizens and residents. It undertakes to clothe combinations of employers and laborers with special power denied to other employers and laborers and other members of society. In another aspect, it deprives all individuals and associations, other than those named, of the protection to safety, liberty and property which any free government must secure to its

subjects. It takes from them the unhampered right to assert in the courts claims against all who tortiously assail their person and property and to recover judgment for the injuries done. It would prevent all persons from having recourse to law for vindication of rights or reparation for wrongs against the privileged few therein designated. It imposes upon some burdens of which others in like situations are released. It throws obstacles in the pathway of those outside unions or associations in the pursuit of their livelihood and in the prosecution of their business not interposed in the way of members of such organizations. It purposes to give to one class of wage earners advantages withheld from others not belonging to a trade union who are engaged in the same kind of work and for the same employer. It frees one set of employers from obligations to which their competitors, who are independent of the association, are subjected. In short, it destroys equality and creates special privilege.

Manifestly, it needs no discussion and no further statement to demonstrate that legislation like that embodied in the bill would violate in many respects underlying principles and fundamental provisions of the Constitution of this Commonwealth and of the United States.

Comment. The right of association is taken for granted. There is no interference with such liberty apparent here. This case is given to illustrate the principle of association in action and also because there are reiterated

certain "liberty ideals" upon which the whole of our legislation is built. That some of these ideals are grossly unrealistic (e.g. that "all men are born free and equal") does not derogate in any way from the rôle which they have played in forming the statute law of the United States.

Speech — Birth Control

New York Times, 1916.

Mrs. Sanger and others were arrested for spreading information on this subject at a clinic in Brownsville on October 28, 1916. It was announced on October 30 that the subject would be fought by the School of Sociology of Fordham University (Roman Catholic). October 31 Miss J. Ashley was convicted and fined for circulating birth control literature. Mrs. Sanger was held for trial November 7, released on bail, reopened her clinic and was rearrested November 16 on the charge of maintaining a public nuisance.

Meanwhile a lively public discussion of the advisability of the propaganda took place. Discussions took place at medical societies and many prominent physicians put themselves on record as approving of the movement. The subject was also discussed at a meeting of the American Association for the Advancement of Science, December 27, 1916. A public meeting was held, addressed by prominent citizens, the call for this being signed by distinguished men and women.

Mrs. Byrne, a sister of Mrs. Sanger, who had taken part in the propaganda, was imprisoned and forcibly fed to keep her alive, as she had gone on hunger strike.

Mrs. Sanger was also imprisoned early in 1917 but did not resist. She completed her sentence in entire quietness.

Comment. Objections to birth control propaganda are chiefly two — (1) That it is opposed to the revealed will of God, and (2) that it would be a direct blow at the manhood force of the nation. Then there is the objection that it would lead to an increase of license in sex relations. If the opinion of the time coincides with either of these views birth control advocates will not be allowed to pursue their propaganda.

Miscellaneous

110 *Pacific Reporter* (?) 1020.

A statute of the Washington legislature providing that insanity should be no defense in criminal actions but that the presiding judge might, at his discretion, commit to an insane asylum any person convicted who, in his opinion, was insane, was held unconstitutional because it violated the "due process of law clause of the Constitution," and also the right of trial by jury.

Cleveland Plain Dealer, January 5, 1914.

"Mother" Jones, labor leader, was seized by the militia upon her arrival at Trinidad, Colorado, from El Paso, taken from a Santa Fe train, held for two hours and deported from the strike district. She was ordered never to return to the district. There is no further indication of the ground on which she was silenced. It is, however, a matter of common knowl-

edge that she was a powerful influence among the striking miners.

Comment. This action was under martial law by which many interferences with liberty are commonly justified in the name of the safety of the state.

THE NATURAL LAW OF LIBERTY

The cases under the foregoing classification are sharply differentiated. In the first small group the principle is evident that *no one shall interfere with the freedom or liberty of the individual in the way of forcible restraint, not even the State.* Slavery is no longer practised except surreptitiously under any so-called "civilized" government. It is taboo. So with all the subordinate forms of which it is the chief. That practical slavery and actual peonage do exist today under civilized government is true; but they exist *sub rosa* and when exposed in their true light are abolished. I have not thought it exact to include what is sometimes called wage slavery here. It is hyperbolical to call this slavery, whatever it may be, and however undeniable in a modern state; besides the state's attitude toward this is somewhat indicated under "police regulations."

The genuineness of the public conscience on this point is hardly open to doubt. No state today tolerates *lettres de cachet;* and the writ of *habeas corpus* is a practical guarantee against false imprisonment. Trial by jury, by which was meant trial by one's peers, is

another means employed to attain this practical freedom. Constitutional prohibition of excessive fines and bail, requirement of "due process of law," etc., are other indications of the genuineness of the desire that individuals shall be free from constraint. That it does not work out always in this way is nothing to the point. That is a matter for social reform. The conscience of the state is perfectly clear that *no man shall of his own motion and for his own ends coerce another into any kind of bondage.* The Emancipation Proclamation of Lincoln, while avowedly adopted as a war measure, had yet been preceded by so long and vigorous an educational campaign that when the proclamation was made it settled for all time the policy of the United States of America. The policy of the world is in agreement with this. Even Nevinson's account of the very genuine slavery practised in Portuguese West Africa is no exception, for this was not a government measure but the result of the corruption of individual officials.

But every remaining case, however different it may be in character from the others, belongs properly in the class of *restraints upon liberty.* These cases illustrate what liberty is in a modern state. It is checked by restrictions upon *Freedom of Movement.* Under this heading we find Ghettoes. Now ghettoes exist in many countries as a practical fact. In Russia at least they were legal before the Great War, while they are quite illegal and substantially non-existent in English speaking countries and most others; but all the other in-

stances are avowed, legal, and probably permanent, restrictions upon freedom of movement. At least the principle is permanent that freedom to come and go is entirely dependent upon public policy.

Under *interference with freedom of action* there is a wide variety of cases. "Carrying weapons" comes of course, equally with the following division, under Police Regulations, but this has a character of its own. The people are constitutionally guaranteed the "right to bear arms" but that right can only be exercised in accordance with the law.

Police regulations as I have used the term here include not only ordinary policing but what has come to be called, particularly in America, the *police power of the state.* While the term is peculiarly American, the fact is universal. The cases cited here, and a thousand others which might be cited, make it plain that anything which menaces the safety, honor and welfare of the people will be forbidden, and that entirely regardless of whether the constitution be counted supreme or the legislature; which it is to be being wholly a question of political expediency. But police power is positive as well as negative. Recent decisions such as those affecting hours of labor, health conditions, etc., show that anything will be ordered which is for the interest of the whole. Not even the venerable freedom of contract can stand in the way of this. Nor can the sacred principle of free competition and opposition to monopoly. All that need be proved is the fact of interference with the welfare of the group —

such action will be condemned; or that an act ministers to the welfare of the group, it will be approved. *Mr. Justice Holmes* in *Hudson County Water Co.* v. *McCarter* (*q.v.*) has shown to what extent the police power may interfere with the so-called right of private property. This leads me to say that it is obvious that there are no natural rights outside the state, and the state will deprive any man of these rights, which it guarantees him, the moment that they conflict with state interests. If it is a constitutional government it will not do this without due process of law; but it will deprive him none the less and, in war time, if necessary, without due process of law and without compensation. This will be further dealt with in speaking of eminent domain. The position which I have here taken is supported by the combined judgments of *Chief Justice White* in *Allgeyer* v. *Louisiana* and of *Mr. Justice Hughes* in *C. B. & Q. R. R.* v. *McGuire,* the one modifying the other. The police power has been differentiated from eminent domain. It has been said[a] that the police power fetters the rights of property, eminent domain takes them away; but it is merely a difference of degree. The important thing is to observe that *the state is supreme* and that the offenses pointed out under Police Regulations and Freedom in Property Rights are not necessarily permanent. *The offense consists not in anything inherent in the act but only in its being conceived to be detrimental to the group interest.* The present day laws

[a] Note. — Article Eminent Domain in 11th ed. Encyc. Brit.

may be completely reversed; but it is safe to say that, if they are reversed, it will be for the same reason that they now hold, viz.: their relation to the conceived welfare of the group.

The various cases given under *Interference with Freedom in Property Rights* show conclusively that property is in no situation absolute. The state, as well as its various subdivisions, taxes — i.e. seizes property without property compensation. Franchises, rights of way, right to do what one will with one's own (admission to hotels and theaters) rights to charge what one will for one's services, (rate regulation of railroads, etc.), contracts and many similar property rights are held, not precariously indeed, but very definitely under the will of the State; and in Eminent Domain this principle finds its fullest and most overt expression. While constitutional countries habitually do recompense those whose property is seized, it often occurs that no compensation in money or goods can adequately compensate. One does not want one's ancestral home destroyed even if the condemnation price is more than the home is worth commercially; but this makes no difference. Absolute property, according to statutes and the common law very evidently inheres in the State alone.

In time of war this principle is seen working simply and boldly in the open. The State commandeers anything that is useful or is thought to be useful.

Under *Interference with Freedom in Personality* I have grouped a number of cases which only very in-

directly have to do with the preservation of life or property. They are cases which illustrate the volitional life of man, the things which he purposes to do with his life. There is a tradition that these things are sacred, that no government can touch them. Much eloquence has been wasted to prove that these represent inviolable rights *par excellence*. The simple reply to all this is that the State does not interfere with them. A man may marry or cohabit with whom he pleases but must do as the State bids or, rather, must not do what the State forbids. His worship is subject to the same restrictions. We have a tradition that here every man is free to worship God as his conscience dictates. One has but to recall the prohibition of polygamy to the Mormons, the prison sentences of "Elijah" Sanford, "Holy Ghost" Schlaetter and many others, the suppression of various sects which have made sex too central for the tastes of society, and the prosecutions of Christian Scientists, to realize that when religion takes an outward form in actions which disturb the *taste* of the group, it has no more freedom than any other form of opposition.

Among our cherished shibboleths are freedom of speech, of the press, manhood suffrage, the right to associate with whom we please and anywhere; and most important of all, the right of self expression, of advocating with overt acts that which we most earnestly desire to see come to pass. Now a very valuable and interesting book could be written to show the progress made by the world in securing these desiderata of man-

kind; but whatever progress has been made, whatever progress shall hereafter be made in securing these things it is evident that freedom in personality, like freedom of body or property is, after all, only relative. The State does not today permit slavery. It is probable that slavery will never again exist in a civilized state and that many existent forms of "commercial slavery" will be modified if not entirely wiped out; but so long as imprisonment exists there is no absolute freedom of person. So with property, so with personality.

It may seem to some that I have gone a roundabout way to demonstrate the obvious. If I have demonstrated it I shall be content. There is so much loose and inexact talk about liberty that it is well to know precisely in what that liberty consists. I have not sought in this book either to arouse enthusiasm for any cause or to stir men to action. The first chapter showed, clearly, I hope, that there is a marked difference between ethics as science and as art. *These cases all have to do with a very narrow but fundamental region of conduct in which the word duty is inevitably related to man's attitude toward the State and the State's attitude toward him.* The State's prohibitions and commands may rest upon unsound political principles and unworthy superstitions; but if one resists them he does so at his own peril.

It would be inexact to leave this subject without pointing out that cases under all the previous classifications have dealt with the positive side of man's

liberty, the very large field in which his will is defended by the State against all comers except the State itself — and even against the State in the form of constitutional guarantees. The State is indeed often weakened, in a democracy, by these very constitutional guarantees. "Martyrs to conscience" are sometimes supported by the very laws which have made their rebellion possible and dangerous to the further existence of the State.

But the one thing that stands out clearly, as I think, from all these multitudes of cases, multitudes not because of the actual number contained in this book but because of the thousands which are too obvious to be set down, is that the group is sovereign and absolute. Should all these groups one day coalesce, then that which the Group of Groups ordains will be the supreme command for man in society. His highest obligation as a social being will be to do whatever ministers to the well being of the group in the opinion of those who are chosen to represent it. No defiance of this will ever be justified by the group itself. Any justification which such a defiance may expect must come from some other source. It is not the province of this book to enter into that question.

Treason is never forgiven if known to exist; and it will always be punished with death, or the social equivalent of death, expulsion from the group or close confinement, whenever it is, or seems to be, dangerous to the further continuance of the group.

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INDEX OF CASES

The abbreviations used in citing the law reports of Great Britain and the United States are too numerous to justify indexing or explaining them. Any law library will furnish such information. For the purposes of this book such explanation is, however, unnecessary. The references have been given as a guaranty of good faith on my part; and also in order that the cases may prove useful for further research on the part of special students.

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